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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

THE UNITED STATES OF AMERICA, Appellee, against SAMUEL BAYER, alias SAMUEL BOYARSKY, ELIAS BAYER, alias ELIAS BOYARSKY, and WALTER V. RADOVICH, Defendants-Appellants.	C-120-468

Statement by Appellants Bayer Under Rule 13.

The indictment herein is against the above named defendants for "Conspiracy to defraud the Government of the faithful services of an officer of the United States Army". An alleged violation of Title 18, Section 88, U. S. C.; was filed on July 12, 1945. On July 16, 1945, all defendants pleaded "Not Guilty". On September 26, 1945, defendant Radovich filed a demurrer to the indictment and a plea in bar (former conviction). On October 3, 1945, the demurrer was overruled and the plea in bar overruled.

The trial was begun on October 3, 1945, as to all defendants before Barksdale, D. J. The trial was concluded on October 23, 1945, with a verdict of guilty as to all defendants with a special plea for clemency.

Defendant Samuel Bayer was sentenced to two years confinement and a fine of $10,000. Defedant Elias Bayer was sentenced to 18 months confinement and fined $5,000. Defendant Walter V. Radovich was sentenced to confinement for one year and one day.

4 *Statement by Appellants Bayer Under Rule 13.*

On October 29, 1945, defendant Radovich filed his notice of appeal. On the same day defendants Samuel and Elias Bayer filed a notice of appeal. Stipulations and orders extending the time of defendants to file a bill of exceptions to January 8, 1946, were made and filed.

Defendant Radovich was released on $5,000 bail. Defendant Samuel Bayer and Elias Bayer were released on bail pending appeal by order of the Circuit Court of Appeals made on December 4, 1945.

The Government appeared by John F. X. McGohey, U. S. Attorney (Edward C. Wallace and Samuel Rudykoff, of
5 counsel).

Defendants Samuel Bayer and Elias Bayer appeared by Samuel Conrad Cohen (Joseph B. Keenan and Washington Irving Levy, of counsel). On November 9, 1945, Archibald Palmer filed a notice of appearance for said defendants Bayer and since this appeal was taken has been substituted as attorney of record for the defendant Samuel Bayer and further since this appeal was taken Max E. Sanders has been substituted as attorney of record for defendant Elias Bayer.

Defendant Radovich appeared by Roger Robb (Samuel T. Ansell, of counsel).

6 The time of defendants to serve and file a bill of exceptions, assignments of error and transcript of record was extended to January 8, 1946, was further extended to March 1, 1946, and was further extended to April 15, 1946.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,
Appellee,

v.

SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH,
Appellants.

Statement by Appellant Walter V. Radovich Under Rule 13.

This is a criminal case commenced by the filing of an indictment on the 12th day of July, 1945.

The indictment is in one count and charges the appellant and two co-defendants, Samuel Bayer and Elias Bayer, with conspiracy to defraud the United States, in violation of Title 18, Section 88, U. S. Code, in that the appellant Radovich, Samuel Bayer, Elias Bayer, and other persons to the grand jurors unknown, beginning on or about September 1, 1942, and continuing up to and including the date of the indictment, conspired to defraud the United States of the faithful services of Radovich, an officer of the United States Army.

There has been no change of parties.

The trial before Honorable Alfred D. Barksdale and a jury was commenced on October 2, 1945, and concluded on October 23, 1945. The jury found the appellant Radovich and the co-defendants guilty.

4b *Statement by Appellant Walter V. Radovich Under Rule 13.*

The defendant Samuel Bayer was sentenced to be imprisoned for two years and to pay a fine of $10,000. The defendant Elias Bayer was sentenced to be imprisoned for eighteen months and to pay a fine of $5,000. The appellant Radovich was sentenced to be imprisoned for one year and one day.

Under arraignment the appellant Radovich was released in the custody of the Army of the United States. Upon conviction and sentence the District Court denied the appellant Radovich's application to be released on bail pending this appeal, but continued bail pending application to this Court.

5b

Upon application to this Court an order was entered admitting the appellant Radovich to bail in the sum of $5,000, and on November 19, 1945, bond in that amount was filed for the appellant Radovich and he is now at liberty under such bail.

No question has been referred to a Commissioner, Master or Referee.

Sentence was imposed upon the appellant Radovich on October 24, 1945. Notice of appeal was filed on October 29, 1945.

6b

Docket Entries.

Docket 120

CRIMINAL DOCKET

THE UNITED STATES vs. SAMUEL BAYER, alias SAMUEL BOYARSKY, ELIAS BAYER, alias ELIAS BOYARSKY, and WALTER V. RADOVICH.	Violation of Title 18, Sec. 88, U. S. C. Conspiracy to defraud the Gov't of the faithful services of an Officer of the United States Army.

PROCEEDING	
July 12, 1945	Filed Indictment.
July 16, 1945	Samuel Bayer Pleads Not Guilty. Bail Cont'd.
July 16, 1945	Elias Bayer Pleads Not Guilty. Bail Cont'd.
July 16, 1945	Walter V. Radovich Pleads Not Guilty. Custody of Army.
July 25, 1945	Filed transcript of record of proceedings. (as to all Defts.). Knox, J.
Aug. 1, 1945	Filed application, order & consent permitting deft. Samuel Bayer to leave the jurisdiction of this Court—Rifkind, J.
Aug. 6, 1945	Filed transcripts of record of proceedings. 7/19/45 & 7/23/45.
Aug. 31, 1945	Filed affidavit, motion and order permitting Roger Robb to try this action on behalf of deft. Walter V. Radovich—Mandelbaum, J.
Sept. 6, 1945	Samuel Bayer—see 120/95 for bond filed.

10 *Docket Entries.*

	Sept. 6, 1945	Elias Bayer—see 120/96 for bond filed.
	Sept. 11, 1945	Filed Notice of Appearance—Roger Robb Atty. for W. V. Radovich.
	Sept. 26, 1945	Filed motion by defendant Radovich for postponement of trial until court-martial proceedings have been disposed of.
	Sept. 26, 1945	Filed Demurrer to Indictment by defendant Radovich.
	Sept. 26, 1945	Filed Plea in Bar (Former Conviction) by defendant Radovich.
11	Sept. 28, 1945	Filed affidavit and order directing argument on plea in bar and demurrer be set for Oct. 2, 1945 or as soon thereafter as counsel can be heard—Barksdale, J.
	Oct. 3, 1945	Filed order and affidavit—authorizing U. S. Atty to employ a physician to examine Alfred H. Jacobson to determine physical fitness as a witness—Barksdale, J.
	Oct. 3, 1945	Memo endorsed on demurrer filed Sept. 26, 1945. Demurrer argued. Overruled—Barksdale, J.
	Oct. 3, 1945	Memo endorsed on plea in bar filed Sept. 26, 1945. Plea in bar argued. Overruled—Barksdale, J.
12		
	Oct. 3, 1945	Filed demurrer to defts.' plea in bar Memo endorsed—Demurrer to plea in bar sustained—Barksdale, J.
	Oct. 3, 1945	Memo endorsed—Motion for postponement of trial filed 9/26/45—Motion denied—Barksdale, J.
	Oct. 3, 1945	Trial as to all defendants begun before Barksdale, J.

Oct. 4, 1945	Trial contd.	
Oct. 5, 1945	Trial contd.	
Oct. 9, 1945	Trial contd.	
Oct. 10, 1945	Trial contd.	
Oct. 11, 1945	Trial contd.	
Oct. 15, 1945	Trial contd.	
Oct. 16, 1945	Trial contd.	
Oct. 17, 1945	Trial contd.	
Oct. 18, 1945	Trial contd.	
Oct. 18, 1945	Filed stip. re: absence of deft. Samuel Bayer during trial.	14
Oct. 22, 1945	Trial contd. Summations by both sides made.	
Oct. 23, 1945	Trial concluded—Verdict—All defts guilty with a special plea for clemency.	
Oct. 24, 1945	Filed judgment #46897. Samuel Bayer—Two years at a place of confinement to be designated by the Attorney General of the United States and fined $10,000. Defendant not ordered to stand committed for non-payment of fine. Defendant to surrender Oct. 31, 1945. Bail continued. Barksdale, J.	
Oct. 24, 1945	Filed judgment #46898. Elias Bayer—Eighteen months at a place of confinement to be designated by the Attorney General of the United States and fined $5,000. Defendant not ordered to stand committed for non-payment of fine. Defendant to surrender Oct. 31, 1945. Bail continued. Barksdale, J.	15

16 *Docket Entries.*

	Oct. 24, 1945	Filed judgment—Walter V. Radovich—One year and one day at a place of confinement to be designated by the Attorney General of the United States. To surrender 10/31/45. Bail continued. Barksdale, J.
	Oct. 24, 1945	Issued commitment in triplicate as to all defendants.
	Oct. 29, 1945	Filed Notice of Appeal and Grounds of Appeal of Walter V. Radovich (notice sent to Judge Barksdale).
	Oct. 29, 1945	Filed Notice of Appeal and Grounds of
17		Appeal of Samuel Bayer and Elias Bayer (notice sent to Judge Barksdale).
	Nov. 7, 1945	Filed affidavit & Order for Writ of Habeas Corpus for Samuel Bayer for examination in supplementary proceedings—Issued writ —Returnable 11/14/45.
	Nov. 7, 1945	Filed affidavit & Order for Writ of Habeas Corpus for Elias Bayer for examination in supplementary proceedings—Issued writ —Returnable 11/14/45.
	Nov. 9, 1945	Filed Notice of Appearance. Archibald Palmer, Atty., of Counsel for Samuel & Elias Bayer.
18	Nov. 13, 1945	Filed elections (2) of Defts. Samuel & Elias Bayer to begin service of sentence—dated 11/10/45.
	Nov. 14, 1945	Elias & Samuel Bayer sworn in supplementary proceedings—Caffey, J.
	Nov. 14, 1945	Filed supersedeas bonds (2) for Samuel & Elias Bayer in sum of $10,000 for Samuel Bayer & $5,000 for Elias Bayer dated 11/14/45. National Surety Corp.

Nov. 19, 1945	Filed stipulation extending time of Samuel & Elias Bayer to file bill of exceptions, etc., to and including 1/8/46—So ordered, Conger, J.	
Nov. 19, 1945	Filed bond for Walter V. Radovich pending appeal for $5,000—Fed. & Deposit Co., Surety.	
Nov. 26, 1945	Filed stipulation extending time of Walter V. Radovich to file bill of exceptions, etc., to and including 1/8/46. So ordered, Conger, J.	
Nov. 27, 1945	Filed Commitment & entered return. Defendant Samuel Bayer delivered to the Fed. Inst., Danbury, Conn. 11/14/45.	20
Nov. 27, 1945	Filed Commitment & entered return. Defendant Elias Bayer delivered to the Fed. Inst., Danbury, Conn. 11/14/45	
Nov. 27, 1945	Filed Writ of Habeas Corpus ad testificandum as to Elias Bayer. Memo Endorsed. Writ Dismissed 11/14/45. Caffey, J.	
Nov. 27, 1945	Filed Writ of Habeas Corpus ad testificandum as to Samuel Bayer. Memo Endorsed. Writ Dismissed 11/14/45. Caffey, J.	
Dec. 4, 1945	Filed true copy of order of C. C. A. granting bail in sum of $5,000 for each defendant—A. M. Bell, Clerk C. C. A.	21

22

Indictment.

IN THE

DISTRICT COURT OF THE UNITED STATES

FOR THE SOUTHERN DISTRICT OF NEW YORK

* * * * * * *

Southern District of New York, ss.: The Grand Jurors for the United States of America duly empaneled and sworn in the District Court of the United States for the Southern District of New York and inquiring for that District, upon their oath present:

23 That heretofore, to wit, beginning on or about the 1st day of September, 1942, and continuing thereafter up to and including the date of the filing of this indictment, at the Southern District of New York and within the jurisdiction of this Court, SAMUEL BAYER, alias Samuel Boyarsky, ELIAS BAYER, alias Elias Boyarsky, and WALTER V. RADOVICH, the defendants herein, unlawfully, wilfully and knowingly did combine, confederate and agree together, and with each other, and with divers other persons whose names are to the Grand Jurors unknown, to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful,
24 disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud.

It was part of the conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid make the acquaintance of various officers of the United States Army stationed at various United States Army Posts

including Mitchell Field, Long Island, New York; 39 Whitehall Street, New York, N. Y.; Middletown Air Depot, Middletown, Pennsylvania; Bradley Field, Connecticut; and Westover Field, Massachusetts.

It was further a part of said conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid entertain and give various gifts to the aforesaid officers of the United States Army.

It was further a part of said conspiracy that the defendants Samuel Bayer, alias Samuel Boyarsky, and Elias Bayer, alias Elias Boyarsky, would during the period aforesaid give sums of money amounting to approximately 26
$7,000 to the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant Walter V. Radovich and to induce him, in violation of his lawful duty, to transfer private Martin Bayer, and private Melvin Usdan, both soldiers in the United States Army, from and to various units of the United States Army in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of continental United States.

It was further a part of said conspiracy that said defendants would conceal such transactions and acts, as aforesaid, and would do such other, further and different acts as they might deem necessary and advisable to prevent the disclosure of the existence of said conspiracy and would attempt to obtain the destruction and alteration of records, books and documents which might in any way evidence the existence of said conspiracy and would attempt to suppress and obtain the suppression of any and all information and evidence of the acts made and done in furtherance of said conspiracy. 27

OVERT ACTS

1. In pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of April, 1943, the defendant ELI BAYER had a conversation with one Harold Busch at 84 Fifth Avenue, New York, N. Y.

2. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL
29 BAYER, alias Samuel Boyarsky, had a conversation in a taxicab with the defendant WALTER V. RADOVICH.

3. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL BAYER, alias Samuel Boyarsky, had a conversation with the defendant WALTER V. RADOVICH in an automobile in the vicinity of Rockefeller Center, New York City.

4. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of July, 1943, the defendant SAMUEL
30 BAYER, alias Samuel Boyarsky, had a conversation with the defendant WALTER V. RADOVICH at the Hotel St. Moritz, New York City.

5. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of August, 1943, the defendant SAMUEL BAYER had a telephone conversation with one Joseph Busch.

6. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of August, 1943, the defendant SAMUEL BAYER entered a taxicab outside the Hotel Governor Clinton, New York, N. Y.

7. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, on or about the 27th day of August, 1943, the defendant SAMUEL BAYER made a telephone call to Albany, New York.

8. And further in pursuance of said conspiracy and to effect the objects thereof, at the Southern District of New York and within the jurisdiction of this Court, in and about and during the month of November, 1943, the defendant ELIAS BAYER, alias Elias Boyarsky, boarded a railroad train at the Pennsylvania Station, New York City, N. Y.; against the peace of the United States and their dignity and contrary to the form of the statute of the United States in such case made and provided (Title 18, Section 88, United States Code).

JOHN F. X. MCGOHEY,
United States Attorney.

34

Endorsements on Indictment.

July 16, 1945 Samuel Bayer Pleads Not Guilty. Bail cont'd. Elias Bayer Pleads Not Guilty. Bail cont'd. Walter V. Radovich Pleads Not Guilty (Custody of Army). Knox, J.

Oct. 2, 1945 Trial of all defts. begun before Barksdale, J.

Oct. 3, 1945 Trial contd.

Oct. 4, 1945 Trial contd.

Oct. 5, 1945 Trial contd.

Oct. 9, 1945 Trial contd.

35 Oct. 10, 1945 Trial contd.

Oct. 11, 1945 Trial contd.

Oct. 15, 1945 Trial contd.

Oct. 16, 1945 Trial contd.

Oct. 17, 1945 Trial contd.

Oct. 18, 1945 Trial contd.

Oct. 22, 1945 Trial contd.

Oct. 23, 1945 Trial contd. & concluded—All defts. guilty. Special plea for clemency as to all defts.

Oct. 24, 1945 For sentences of all defts. see judgment filed. Barksdale, J.

36

Plea in Bar (Former Conviction) of Defendant Walter V. Radovich.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES v. SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.	Criminal No. 120-468

Now comes Walter V. Radovich, one of the defendants herein, and pleads in bar to the indictment herein against him as follows:

1. On June 11, 1945, this defendant, then and now an officer of the United States Army, before a United States Army general court-martial having jurisdiction of the defendant and the offense charged, was arraigned upon charges preferred against him, pleaded not guilty, was tried, and on June 29, 1945, was convicted and sentenced by said general court-martial. A copy of said charges, findings, and sentence are herewith, Exhibit A.

2. Thereafter on July 12, 1945, a grand jury, duly empaneled in the District Court of the United States, Southern District of New York, returned in said court the indictment herein charging the defendant with the same offense as that for which he was tried, convicted and sentenced by said general court-martial.

40 *Plea in Bar of Defendant Radovich.*

WHEREFORE, defendant prays that the said indictment against Walter V. Radovich be dismissed.

ROGER ROBB,
Attorney for Defendant Radovich,
Address: c/o James A. Smyth,
Room 505,
150 Broadway,
New York, New York.

September 26, 1945.

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41 EXHIBIT "A"

"RECORD OF TRIAL OF RADOVICH, WALTER V., MAJOR, AIR CORPS, MITCHEL FIELD, NEW YORK, BY GENERAL COURT MARTIAL APPOINTED BY THE COMMANDING OFFICER, HEADQUARTERS FIRST AIR FORCE, MITCHEL FIELD, N. Y.—TRIED AT AIR BASE, MITCHEL FIELD, N. Y., 11, 27, 28, 29 JUNE 1945.

"ARRAIGNMENT

"The accused was then arraigned on the following charges and specifications—

"CHARGE I: Violation of the 95th Article of War. [Art. 95. CONDUCT UNBECOMING AN OFFICER AND GENTLEMAN.—
42 Any officer or cadet who is convicted of conduct unbecoming an officer and a gentleman shall be dismissed from the service. Title 10, U. S. C., § 1567.]

"SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States,

for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

"SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December, 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan 44
from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

"CHARGE II: Violation of the 96th Article of War. [Art. 96, GENERAL ARTICLE.—Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring discredit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the dis- 45
cretion of such court. Title 10, U. S. C. § 1568.]

"SPECIFICATION 1: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First

Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York.

"SPECIFICATION 2: In that, Major Walter V. Radovich (then Captain), Air Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando
47 Group), an organization then alerted for overseas movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement.

"FINDINGS

"Neither the prosecution nor the defense having anything further to offer, the court was closed and voted in the manner prescribed in Articles of War 31 and 43. Upon secret written ballot, two-thirds of the members present at the time the vote was taken concurring in each finding of guilty, the court finds the accused:

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Of Specification 1 of CHARGE I:	GUILTY
Of Specification 2 of CHARGE I:	GUILTY
Of CHARGE I	GUILTY
Of Specification 1 of CHARGE II:	GUILTY
Of Specification 2 of CHARGE II:	GUILTY
Of CHARGE II:	GUILTY

"SENTENCE

"The court was closed, and upon secret written ballot two-thirds of the members present at the time the vote was taken concurring, sentenced the accused to be dismissed from the service, to forfeit all pay and allowances due and to become due, and to be confined at hard labor, at such place as the reviewing authority may direct, for three (3) years."

POINTS AND AUTHORITIES

1. The trial of defendant Radovich under the indictment is barred by his general court-martial trial and conviction for the same offense. 50

Grafton v. United States, 206 U. S. 333.

2. The 95th and 96th Articles of War, Title 10, U. S. C. § 1567, 1568 (formerly the 61st and 62d Articles) are military common law articles; conduct which violates them must be specified but need not be, and usually is not, given a name; whether conduct does or does not violate the Articles, is determined by the court-martial in the light of Service custom and precedents.

3. According to military common law, conduct which in any manner defrauds, or tends to defraud, the Government of its rights, or which violates or neglects official duty, or prejudices military command and good order and discipline, including conspiracies, is cognizable under those articles. Except for the property and money fraud specified in Article 94 (10 U. S. C. § 1566), defrauding or conspiring to defraud the Government, whether the "fraud" or "conspiracy" be employed or not, is chargeable under Articles 95 and 96 and under those Articles only. 51

4. Both civil and military legal language have their peculiarities, and it may, in instances, be difficult to conform the offenses charged under the two. As Justice Harlan said, in the Grafton case,

> "It may be difficult at times to determine whether the offense for which an officer or soldier is being tried [in the civil court] is, in every substantial respect, the same offense for which he had been previously tried [by courtmartial]. We will not therefore attempt to formulate any rule by which every conceivable case must be solved."

But, as the court observed, the determination must be
53 made.

5. A fair comparison of the military charge and the civil charge shows that in both the charges the substance and the evidence to sustain them are the same.

(a) The military *charge* under the 95th Article is for conduct unbecoming an officer and gentleman and the *charge* under the 96th Article is for disorders and neglects to the prejudice of good order and military discipline, or for conduct of a nature to bring discredit on the service, or for a non-capital crime or offense, there being no particularization. The *specification* under each military *charge* is, in substance, that Radovich wrongfully and unlawfully received and accepted from Samuel Bayer $7000
54 for the purpose of effecting the transfer of two privates to unalerted organizations (that is, to organizations in continental United States). The term fraud or conspiracy is not used. But all frauds and conspiracies against the United States—except those which have to do with money and property and are specifically denounced by the 94th Article (10 U. S. C. § 1566)—are chargeable under these military common-law articles; and so is every violation of duty.

(b) The indictment charges Radovich, together with Samuel Bayer and Elias Bayer, with conspiracy to defraud the Government of his honest and faithful service, the indictment alleging that a part, which was indeed the essence of the conspiracy, was that the Bayers would give (and Radovich would receive and accept) the $7000, with intent to induce Radovich, in violation of his duty, to transfer the two privates so that they would not be sent out of continental United States.

6. For Radovich to accept and receive the money from Bayer for the purpose specified necessarily required agreement and concurrence between them of action and purpose. Since the substantive offense contains, as a necessary and essential ingredient, such agreement and concurrence between the same parties there can be no indictable conspiracy to commit the offense either at common law or under the Federal statute. *Gebardi* v. *U. S.*, 287 U. S. 112, 122, citing *U. S.* v. *Katz*, 271 U. S. 354, 355; *Norris* v. *U. S.*, 34 F. (2d) 839, 841; *U. S.* v. *Dietrich*, 126 Fed. 664, 667. See also *U. S.* v. *N. Y. C. & H. R.R. Co.*, 146 Fed. 298; *U. S.* v. *Sager*, 49 F. (2d) 725. If, under an unartful military specification, a conspiracy had been specified as a substantive offense along with the substantive offense that was pleaded, it would have been charged under the same common-law articles and no other; and if the proof had fallen short of showing the consummated act of accepting and receiving the money, but had shown the agreement to accept and receive the money, then under age-old military practice the specification would have been amended by the court-martial to conform to the proof and a conviction for the conspiracy under the charge as it stood would have followed.

7. Evidence to sustain the military charges and specifications would be sufficient to sustain the indictment and

58 *Plea in Bar of Defendant Radovich.*

e converso. Divested of only a little verbal dressing, the military charges and the indictment set up the same offense provable by the same evidence.

8. Protection against double jeopardy ought not to be sacrificed to refined verbal differences.

Demurrer of Government to Plea in Bar.

UNITED STATES DISTRICT COURT,

59 SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA v. SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH, Defendants.	DEMURRER C 120-468

Now comes John F. X. McGohey, United States Attorney for the Southern District of New York, and demurs to the plea in bar to the indictment interposed herein by the defendant, Walter V. Radovich, on the grounds (1) That it does not state facts sufficient to constitute a plea in bar,
60 and (2) that the plea in bar is not well taken under the law as made and provided herein.

WHEREFORE, the said John F. X. McGohey, United States Attorney for the Southern District of New York, prays

that this demurrer be sustained and the said plea in bar be stricken as insufficient.

Dated: New York, N. Y., September 28, 1945.

JOHN F. X. MCGOHEY,
United States Attorney for the
Southern District of New York,
Attorney for Plaintiff,
Office and P. O. Address:
United States Court House,
Foley Square,
New York 7, N. Y.

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(*Endorsement*)

Oct 3-1945

Demurrer to plea in bar sustained.

A. D. BARKSDALE,
Judge.

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Demurrer to Indictment of Defendant Walter V. Radovich.

DISTRICT COURT OF THE UNITED STATES,

SOUTHERN DISTRICT OF NEW YORK.

THE UNITED STATES v. SAMUEL BAYER, ELIAS BAYER and WALTER V. RADOVICH.	Criminal No. 120-468

65 Defendant Walter V. Radovich, one of the above-named defendants, demurs to the indictment herein on the following grounds:

1. Said indictment is vague and uncertain, and does not set forth the nature of the right, including the services, judgment, and duty of this defendant, of which it is alleged the United States was defrauded.

2. Said indictment charges no offense against the United States: the offense attempted to be charged being one in which agreement, with concert of action and purpose, is an essential element, the charge of conspiracy will not lie.

66 WHEREFORE, defendant prays judgment dismissing the indictment.

ROGER ROBB,
Attorney for Defendant Radovich,
Address: c/o James A. Smyth,
Room 505,
150 Broadway,
New York, New York.

September 26, 1945.

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Testimony.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

UNITED STATES OF AMERICA vs. SAMUEL BAYER, alias Samuel Bayarsky, ELIAS BAYER, alias Elias Bayarsky, and WALTER V. RADOVICH.	C. 120-468.

Before: HON. ALFRED D. BARKSDALE, *D. J.*, and a Jury. 68

New York, October 2, 1945,
11 A. M.

APPEARANCES:

JOHN F. X. MCGOHEY, Esq., United States Attorney, for the Government (JOHN F. X. MCGOHEY, Esq., SAMUEL RUDYKOFF, Esq., and EDWARD C. WALLACE, Esq., of counsel).

SAMUEL CONRAD COHEN, Esq., attorney for Samuel Bayer and Elias Bayer (JOSEPH B. KEENAN, Esq., and WASHINGTON IRVING LEVY, Esq., of counsel). 69

SAMUEL T. ANSELL, Esq., attorney for Walter V. Radovich (SAMUEL T. ANSELL, Esq., and ROGER ROBB, Esq., of counsel).

Mr. McGohey: There are some motions to be decided, if your Honor please, a plea in bar, a demurrer to the

indictment, a motion for continuation, all filed on behalf of the defendant Radovich. They appeared on the calendar this morning and Judge Leamy, in Room 318, referred all those up here to your Honor.

Mr. Keenan: In addition to that I filed a motion orally in the procedure room, in 318, before Judge Leamy, for adjournment for reasons set forth in the affidavit that I was to hand to the Court, and the Judge likewise referred that to your Honor for decision.

The Court: Let me make this inquiry. If I am to first hear the motions would it not be better to hear them in the absence of the respective panel of jurors, which is
71 the panel in the court, Mr. Clerk?

The Clerk: Yes, your Honor.

The Court: I think it would be better to have the panel retire. Let the jurors return to their room for a moment.

(Panel of jurors retired from the room.)

The Court: You may proceed.

Mr. Ansell: If your Honor please, on behalf of the defendant Radovich, we have filed here a motion for a continuance. I am quite aware that there are motions and motions for a continuance, and I am quite aware that many of them, doubtless for one reason and another, are without merit. In this case I regard this motion as something more than a mere motion for continuance. There is something more than the mere time element involved. There is something more than the convenience of counsel or
72 client. Out of my conscience, out of such sense of justice as I have, this motion is to me, and was made as such, a plea, a prayer to your Honor, for common, ordinary fairness and justice.

I say that because this officer has already been tried, convicted and sentenced by court-martial. This is a case, if your Honor please, clearly to a current jurisdiction. Whether, as I shall subsequently contend, a plea of former jeopardy by reason of this court-martial lie or not, the

Government of the United States chose its forum with the full knowledge of the civil authorities in this case, the United States Attorney.

The court-martial proceeded, there was no indictment against this defendant until within probably ten or twelve days after the court-martial had concluded its actual trial.

In order that there may be no questions as to the full freedom and liberty that the learned United States Attorney had to proceed immediately upon this officer's confinement and arrest, I wish to say that this officer as early as May, June and July, 1944, the command of warfare which he had been engaged in in Burma having been concluded by reason of the oncoming monsoon, came home to 74
this country from Burma, a long trip, over the route from there to Miami and thence to the Pacific Coast, hospitalized along the way as a result of his service.

After he had had a month's sick leave on the Pacific Coast he was ordered to report to General Hunter, the Commanding General of Mitchel Field, in Long Island, when here. He came and reported at Mitchel Field on August 9, 1944. He was immediately placed in confinement in a ward in a hospital that had been specially designed and prepared for the reception of the violently insane and the subduing of them.

While in that hospital not only was he subjected to every possible military indignity and humiliation, but he was investigated, interviewed, questioned by the military authorities. He was likewise questioned and interviewed 75
by the agents of the Federal Bureau of Investigation, operating, I assume, out of the office of the District Attorney here, or at least in co-operation with it.

After this defendant was released from this, what is commonly known as the "nut ward", he was still kept in arrest and restricted within limits of that post command. It developed later at the court-martial that charges had been sworn to and preferred against this officer. They

were not served on him; he knew nothing about them until just before the trial, when these charges were served upon him.

So it was that he was put in confinement and arrest at Mitchel Field, August 9, 1944. He was not tried by court-martial until June, 1945, something like nine or ten months thereafter.

During all this time he was questioned upon many occasions by the military authorities, who were staff officers of General Hunter, and during this time also he was questioned upon occasion, I think a minimum of four, in the office of the United States Attorney here by one of the
77 assistants of the United States Attorney. He was also from time to time, I don't know how many times, but several, likewise questioned by agents, I think they are called field agents, of the F. B. I., in or near the United States Attorney's office.

There was no indictment of Radovich. Such a trial, conviction and sentence as this has to be referred to Washington, to the office of the Judge Advocate General, and maybe on up to the Secretary and the President, and, of course, the sentence cannot become effective until it is confirmed by the President.

The Court: You are referring now to trial by court-martial?

Mr. Ansell: Exactly, sir.

The Court: All right.

78 Mr. Ansell: Having been tried by court-martial, under the statute, the Articles of War, as your Honor knows—that is the technical military name for them, it is also the statutory name—the Articles of War being those rules and regulations which Congress, by the Constitution, is authorized to make for the government and discipline of the Army of the United States, under those articles the proceedings in this case have to go to the Judge Advocate General and on up.

The trial having ended June 29th, it is to be assumed that by reason of the familiarity of the Commanding General and his Staff Command Judge Advocate, that those proceedings were rather expeditiously—in any event such is the requirement of the statute—referred to Washington. So far as we are concerned, Radovich, and Radovich's counsel, that has been the last of that proceeding. We have heard nothing officially, we have heard nothing except what has appeared in the public press. It is true and frank for me to say to your Honor that no lawyer could have done aught but expect that almost immediately the responsible authorities of the War Department would quash those proceedings because of the gross and glaring 80
errors committed by that court-martial, which indeed can properly be characterized as a farce.

The statute requires that any officer exercising court-martial jurisdiction shall keep a man in arrest no longer than eight days and if longer he must report to superior authority. The statute, Articles of War, also require that any officer who does not expeditiously dispose of court-martial charges and proceedings, and take all the action required by the Articles of War, shall himself be subject to court-martial.

There can be no actual doubt but that the proceedings of this Court, this court-martial, conviction and sentence have all been disapproved. Immediately after, as I have said, this indictment was brought.

Now, if your Honor please, I have here and shall file, 81
or shall present and argue at the proper time, a plea of former jeopardy. But after General Hunter had forwarded these proceedings to Washington certain things have taken place, strange administration, at least strange to me, with some familiarity of such matters.

Major Radovich was released from the confinement which ensued upon his conviction, and then he was ordered for duty to Bolling Field, just outside of Washington. From

there he was after some little time, I think not long, ordered from Bolling Field to Andrews Field, somewhere over in Maryland, near Marlboro, ordered for duty to each of those places; arrived there, no duty, no quarters, no anything, just that. And then the last order was an order from the military authorities, the Air Forces of the United States, ordering Radovich to report to the United States Attorney for the Southern District of New York for temporary duty, to report here not later than 10.30 this morning.

So, whether the distinguished United States Attorney knew it or not, by military fiat he became my client's com-
83 manding officer; my client—I could never get in touch with him, and every effort I made to contact my client has been impeded from beginning to end. That is highly suggestive to me of the arbitrariness lurking and which has lurked all along, actuating the military authorities in this case.

If we take that order as it stands, he is to report, and I told him to report, to the United States Attorney for his orders for duty, as silly as that may be. According to the order he is not in contact with me, his counsel; he is taking the orders of the United States Attorney. I don't know whether the United States Attorney upon the terms of that order could not advise him when to appear, how to appear, how to defend, what he should testify to; I really don't know what the intention of the military authorities might be as to whether my client Radovich was to sit
84 with me or whether he was to sit in the corner with Mr. McGohey.

The Court: I think the Court has some slight control over that.

Mr. Ansell: I was going to remark, your Honor, of course, having been an army officer I take no pleasure in criticizing military administration, but it is my duty to do so in this, and it has been in other cases.

It was somewhat, perhaps likely through my effort, that we got an amendment of the Articles of War in time to prevent General Hunter or any other officer from doing just what he did in this case, which was done in so many cases in the last war, when men lay in military guardhouses and jails and military prisons until they almost rotted. That is not American, that is not our army. That is the result of the terrible mixup that comes when we have to create large armies upon the spur of the moment. So there was written the injunction in these articles that if an officer did not expeditiously bring a man to trial he himself was subject to court-martial, and at all stages of the proceeding if he himself did not do his best to bring the conclusion of the trial to an expeditious conclusion he was court-martialed.

Now, what has happened to these proceedings? My client is the football, as I see it, in this case. They both had an opportunity to proceed with Radovich and run with him. They investigated, they did everything they wanted to do; General Hunter's staff officers ordered him to report to the United States Attorney and be interviewed by him throughout this nine or ten months, and finally, after nine months, General Hunter for some reason or other got ready and court-martialed him. And then he threw the ball to Mr. McGohey, and Mr. McGohey apparently has the ball and Mr. McGohey is running with the ball, or doing his best to do so now.

My client—batted backwards and forward between the military and the civil jurisdiction, and ordered around like a flea—Mitchel Field, Bolling Field, Andrews Field, the United States Attorney's office. It has been difficult to catch up with him. And I say to your Honor that I have been so impeded in keeping or getting and keeping in contact with him I have not been able to do my duty effectively as his counsel.

Is it fair, right, just, that after the United States had had an opportunity for ten long months to indict this officer, and they had indicted the other co-defendants now mentioned here long before, and having permitted the military authorities to go forward with the court-martial, and the court-martial proceedings not having been concluded, and they are pending yet so far as we know, with the statutory injunction upon General Hunter that he shall bring all of these matters to the most expeditious conclusion, with the statutory injunction that if these proceedings were referred back to him, having been reversed by the War Department, that he had only two things to do—either
89 proceed to retry him or to dismiss the charges. He does neither. He says nothing to us. He does not advise Radovich of a thing, or me. They lie there. And Mr. McGohey now takes the bill, after all of this waiting, and while the military proceedings are still pending, and we are here in response to answer that indictment.

Can it be said reasonably—I am almost certain it cannot be, I am almost certain it cannot be said legally—that when the United States exercised its jurisdiction over this army officer before court-martial, that they can just make him sport of the big winds and say: "You will be tried there, and before you have heard from that, before it has been disposed of, you can also be tried before the civil court"?

Speaking specifically, your Honor, we know it is rather difficult to sustain a plea of former jeopardy, and it is
90 actually probably more difficult as between the civil forum and the military forum than otherwise, and yet Justice Harlan in Graffman v. United States said it has to be done because they are both courts of the same sovereign.

Can it be said that I can make my plea here of former jeopardy, which I shall make and which from my limited knowledge of the law is sound, that I can make that plea here or should make it before the court-martial jurisdic-

tion has been exhausted and the case there finally disposed of? Shall the answer—we say the answer, "any court", to the one that first took jurisdiction before it has exhausted its jurisdiction, and we have the method whereby it has been exhausted—the opinion by the Judge Advocate General, the War Department, and what General Hunter has to do next? Am I not entitled to that in justice to this man here? Am I not entitled to have this trial continued, not for my reason, not for anybody's reason, but the reason of justice to Radovich, that he may come here, and he is willing to come here; we are willing to be retried before the court-martial—whether we will or will not be, but we are; we are willing to be retried here. Our objection is, 92
your Honor, that we cannot fairly defend here at this time in matters of the utmost importance to this defendant.

I think I have said all that I want, and I want to thank your Honor.

The Court: Let me inquire from Mr. Keenan; what is your position on the matter of continuance?

Mr. Keenan: Your Honor, the reasons are set forth in the affidavit that I intended to file in the procedure room, and was referred to—may I have this handed to the Court. Your Honor, the affidavit may be better understood. I think I can state very succinctly what our position is. This cause, while it is entitled a conspiracy charge in the essence, of conspiring to defraud the United States Government, I think that it was meant to state, out of the impartial 93
services and judgment of an officer of the United States, although the indictment says, "the right to it"—we come to that at a different time. But that is the essence of it. And the essence of the complaint is founded, as we all know, the Government and ourselves, on a claim that an effort was made to delay the departure of one Martin Bayer, a son of Samuel Bayer, one of the defendants, and a nephew of Elias Bayer, and other the son of a widowed sister of Mr. Bayer, to delay their departure for combat

areas. I say that because that was the subject matter of three other indictments that have been lodged and are now to be dismissed pursuant to the statement of the United States Attorney a few moments ago in another court. And the charge is interfering with the ordinary processes or the judgment of Major Radovich, then Captain Radovich, who was the commanding officer, as alleged, of Martin Bayer, a nineteen-year-old boy.

Now, the arrest occurred some time in the month of December, 1944, and I was retained about that time, within a day or two before it. And I happened to be quite ill in a hospital in Washington at the time. In any event,
95 within a very short time, I think a matter of days—we have never been able to get the exact time from the army—Martin Bayer, the subject matter, the essence of this, the favored of the alleged conspiracy, was shipped overseas to the Pacific area where he has been all the time. He is over in Burma now and has been practically all the time since the arrest. We have never had an opportunity because of the war to interview Martin Bayer. We have certain information which has been adduced from such investigations as I have been able to make that causes me to believe and make an affidavit thereto, that there was information given to the defendant Samuel Bayer of physical deficiencies and illness of his boy, and that even at the time that he was—he enlisted, because he did enlist in the United States Army, this Martin Bayer, that he had some
96 difficulties in passing the examination, all of which were related to his father and which caused him undue anxiety and zealousness of the father which led to some of the events which I don't care to go into at this time, but which are the basis of the complaint.

Now, I must state this, that there was a considerable delay, so felt by the United States Attorney—I have to get the facts. It was around December when the arrest occurred, December, 1944; and at that time I was retained

and I conferred with the United States Attorney and told him that I felt he should have the presence of these two defendants and they should tell their story to him under oath for whatever it would amount to in determining whether he should proceed further, whether it would be an offense; and I brought the both of them and they were extensively interrogated before the learned assistant, Mr. Wallace, in Mr. McGohey's presence.

Thereafter, about the 28th or 29th of March, 1945, an indictment or a series of them were returned. Two substantive indictments charged bribery of a United States officer, dividing up sums, $1950 I think, and $5,000, and a third conspiracy on the part of Samuel Bayer, Elias Bayer, 98
and one Greenblatt, who was supposed as alleged to have passed the money. Those indictments, your Honor, are to be dismissed by the agreement of the United States Attorney, we having stated that we would move to elect which one to proceed on, and he decided to dismiss them. But I am giving your Honor the background so that you will know what this affidavit has to do with it.

We ask for a continuance. I asked for a continuance of one week for arraignment. I happened to be in the south at the time. And the arraignment took place about the 1st, 10th or 12th of April, the first two weeks of April, 1945. At that time, because of other engagements that I had and thought of considerable importance, I sought some delay, unsuccessfully, and the case was set for the 99
18th of June, 1945, for trial. At that time, if I remember correctly, there were no judges available during the summer period here in this court on several occasions to try the case and it had to be put over for such reason. In addition thereto, this court-martial proceeding came out of the blue as far as we were concerned, and on the 18th of June, a few days before the 18th of June when this case was to go forward, we were informed by Mr. McGohey, United States Attorney, that he did not desire to proceed

because of this court-martial, of which General Ansell has spoken. Thereafter the case was set by Judge——

The Court: You mean that he said Mr. McGohey did not desire to proceed at that time?

Mr. Keenan: That is right. Oh, at that time. I had not meant to say anything different. At that time.

The Court: Of course, your clients are not involved directly in the court-martial proceeding at all; they are not subject to military law.

Mr. Keenan: I know, your Honor, answering that question, they are not involved in a sense.

The Court: I don't know that it is at all material.

101 Mr. Keenan: But they may be involved in a sense. I don't like it very well that Major Radovich is sent down here subject to the orders of the United States Attorney in a case where my clients are co-defendants. However, that is something I think may come up at a later time.

To answer your Honor's question, there is no military jurisdiction, thank God, in this country, over any civilians, including my two defendants.

On the 18th of June we were not able to go ahead because of the court-martial, and then afterwards there was some slight delay because there were not any judges present from that time on.

The Court: The court-martial proceeding, the actual trial, was concluded when?

Mr. Keenan: July 7th. In any event it was understood
102 between Judge Healey we were ready to go ahead, Samuel Bayer here and Elias Bayer, and I was ready—I happened to be ill at the time and taking some cure, and my colleague, Mr. Levy, stated in open court that I was ready and was willing to proceed. Then, however, Major Radovich sought some delay of thirty days on his arraignment because this new indictment came in against Major Radovich. This was the fourth indictment against two defendants out of the same facts and circumstances.

Then General Ansell, as probably brought out, sought a delay to September, 1945, because of a commitment he had. And at that time I told Mr. McGohey that I had an engagement out in St. Louis on some important matters, and this case was set for October 2nd. So I suspect it is entirely possible that Mr. McGohey will feel that there is more or less of an implied understanding on our part that we were going forward with this case, because I know that he is very desirous from his statement in court to dispose of it.

And I have to make this statement because there is a difference between comity and between counsel for the United States Attorney, for whom I have great respect, and civil relations, and the duty of a lawyer in properly defending the interests of his client. And I cannot escape the statement of the conscientious duty that I owe, that I cannot proceed properly in the defense of Samuel and Elias Bayer without the presence in this courtroom of Martin Bayer, whom I call the Hamlet of this tragedy.

The Court: He is the soldier?

Mr. Keenan: He is the soldier, and he is over in Burma.

The Court: What about the other soldier, his cousin?

Mr. Keenan: His cousin I am not so much interested in; I don't know much about that. But, in any event, Samuel Bayer has three sons and this is the only one that I know to be concerned at all with any controversy in the court. This boy is over in Burma, where he is now suffering from rashes, or we think the jungle fever. Our information is not too clear upon that, but he has been ill.

During the time that we were very earnestly because of professional engagements seeking some delay, we learned of the emphasis that the learned District Attorney placed upon an early trial of this case, where he made the statement that he believes that this was of sufficient importance to raise it to the dignity of a trial for treason, and the fact that it should proceed immediately during the summer periods because there were flyers present who were needed

to subdue the Japs in the Pacific. And my client instructed me, as I have stated in this affidavit, during the pendency of the Japanese war, I mean the actual warfare, not to seek any delay; he would rather take his conseqences, whatever they may be. Because I have stated in the affidavit, while the war with Japan was on, if we made an effort to delay, even to delay trial to get Martin Bayer back, since the efforts of this alleged conspiracy was keeping him out of combat service, and since he was then in a combat area, it might be contended against my client that he was renewing this attempt to save his boy by bringing him back. In any event, that is the way he felt. So that
107 while the war was on I was forbidden by my client to seek what I thought was necessary delay for the return of this boy for his testimony. And I think I may be subject to misunderstanding by the learned District Attorney, of what might be considered a change of position on that, because I have never asserted it before, and this is the first time I have come in court since we are all happy to note the end of the actual warfare, at least we hope it is.

So that I am now, your Honor, making this application on behalf of the two Bayers only, they are all that I represent, asking for a continuance until such time as Martin Bayer can come back to this country, relieved of his duties on the other side of the water. We don't think it ought to be very long, because he is ill, and we think that with other members of the Army he will be returned to this
108 country. And now, and we say this with great respect and with no desire to—well, with great respect and in all seriousness, if the learned District Attorney feels that these flyers and all these men were necessary to properly defend our country and subdue our enemies, we think that danger, of course, is over for some time to come.

The Court: Mr. McGohey.

Mr. McGohey: If your Honor please, Mr. Ansell argued strongly to your Honor that the actions which he charges

to the United States Army impeded him, and I think at one time, if I am correct, he said prevented him from even getting in touch with his client I think if your Honor will look at the papers filed by the defendant Radovich you will find that at least some time General Ansell was able to communicate with him because the defendant Radovich signed and verified the papers which appear before your Honor, or at least some of them.

With respect to anything that the United States Army has done with respect to the defendant Radovich, of course, I do not suppose it is necessary for me to urge upon your Honor that I do not have to answer for that, that is something entirely outside of my control. 110

The fact, your Honor, as set forth in an affidavit which I have filed in this court, show that this indictment which is now moved for trial was returned by the grand jury of this district on July 12th of this year.

The Court: That is an affidavit in opposition to the motion for continuance?

Mr. McGohey: Yes. The affidavit which I filed in opposition to the motion for continuance, yes, your Honor.

The Court: I haven't it.

Mr. Ansell: We haven't it either, your Honor.

Mr. McGohey: No, I am incorrect in that, your Honor. This is the affidavit which I filed with this Court in support of an application for an order directing the argument to be held today on the plea in bar filed by the defendant Radovich, the demurrer filed by the defendant Radovich 111 to the indictment, and the motion for continuance. In other words, when the plea in bar, and the demurrer and the motion were filed with me, or served upon me rather, they contained no notice of argument, nor was any date asked for argument, and in order to bring them on today I secured from the Court an order directing that they be brought on.

But, in any event, I am quoting from what the record in this Court shows, your Honor. This indictment was returned by the grand jury of this district on the 12th of July of this year, and the defendant Radovich pleaded not guilty July 16, 1945.

And on the same day, it being a new indictment, the defendants Bayer, Elias Bayer and Samuel Bayer also pleaded not guilty.

Now, at that time on that day the defendant Radovich was represented by an attorney of this bar, and he filed a plea of not guilty. The Government was anxious to move the case speedily for trial, but at the request of the defend-
113 ant Radovich, who pleaded that he did not have regular counsel at that time, the case was set down until July 23rd. Now, prior to the adjourned date, and specifically on June 20, 1945, Mr. Ansell, with whom Mr. Robb—who is the attorney of record in this case, is associated I understand in Washington—sent a telegram to Judge Healey, the District Judge for Massachusetts, who was here assigned and conducting the court in Room 318, and I have a photostatic copy of that telegram here, and then he followed that up also with a letter to Judge Healey, and in that Mr. Ansell stated that he had appeared for the defendant Radovich as his counsel in the court-martial proceeding recently held at Mitchel Field and that by reason of his representation of Radovich he believed himself to be more familiar with the facts and the law of Radovich's case than any counsel who
114 might be assigned by the Court.

Your Honor will recall that I stated at the time that Mr. Minton, a member of the bar of this Court, appeared for him, stated that he had not been retained by Radovich, and there was a discussion before Judge Healey as to whether or not Radovich was a person to whom counsel ought to be assigned. And the matter was laid over for that purpose. And then in the meantime came these letters and documents from Mr. Ansell. I beg your pardon, your

Honor—General Ansell. He further stated that he would be willing to represent Radovich in the trial in this court if he could get an adjournment at least until September 3, 1945, which he stated was the earliest date which he could, consistent with his then current commitments, be available to try the case.

Now, on the call of the calendar on July 23rd, this matter was fully discussed before Judge Healey and Judge Healey stated to me that he would accept the representations of General Ansell and Radovich and he would put the case over until September 4th, which he did.

Now, when we come to September 4th, the attorneys for the defendants Bayer, Mr. Keenan particularly, conferred 116
with me and stated—called, rather, to my attention that September 7th was one of the Jewish high holy days, that thereafter there was a period of holidays or holy days leading up to the very high holy day which occurs on September 17th, and he pointed out to me that all likelihood was that if the trial was started on the 4th or 5th of September, it could not be concluded before the 7th and probably not before the 17th, and he felt that it would be really indecent to require two men of the Jewish faith to be on trial in a criminal court during their holy days. That was a consideration which appealed to me, and I agreed with him. And I then inquired if we could not go on immediately after that. Mr. Keenan represented to me that he had a long-standing commitment to be out in the Middle
West for a period of approximately, I think it was, from 117
about September 10th until September 25th, on business for a regular client of his. And I could understand that. And accepting his word, the trial was put over until today, your Honor.

Now, if I may address myself first to this application by Mr. Keenan.

The Court: Let me interpolate a question. How long is it contemplated that the actual trial of this case would require?

Mr. McGohey: I would think, your Honor, that if the trial is started today we would certainly be finished by Thursday or Friday of next week.

The Court: You mean the whole trial or the Government's case?

Mr. McGohey: No, the whole trial, your Honor, I don't think it should take more than that time. Of course, your Honor realizes that anybody making a guess in advance of a trial is only making a guess. But my judgment is that it ought to be concluded in that time.

This is the very first time since I first met Mr. Keenan in connection with this case last December that I have
119 heard any suggestion that Martin Bayer, the son of Samuel Bayer, would have possibly anything to say or any testimony that he might give which would be relevant and material in any way to the issues in this case. Martin Bayer's name has been discussed and mentioned frequently in our conversations, but never with the suggestion that he was necessary or a desirable witness in this case.

Now, I will accept Mr. Keenan's representation that neither he nor his clients desired to make any application for the return of Martin Bayer while the war in the Pacific was still going on. But the war in the Pacific ended on the 15th of August and I had conferences with Mr. Keenan subsequent to the 15th of August, particularly just preceding this September 3rd, and not even at that time was there any suggestion that Martin was a necessary or
120 a desirable witness. I don't understand that there is any statement made in this affidavit, in the short time I have had to read it, nor did I hear any statement made this morning that any application has been made to the proper authorities for the return of this young man.

If I understand Mr. Keenan's argument, it is this, that some time in the normal processes of bringing our troops back from the Pacific, Martin Bayer will come to this country and that if, as and when he gets here, that then he will be

available. On that basis I don't know how long this case might be adjourned. I think that that, your Honor, is pretty indefinite, in view of the failure to show any application or any effort whatsoever to bring the young man back here.

Now, with respect to General Ansell's argument. Most of it, of course, your Honor, was a criticism of the army. I don't know what argument was made by General Ansell that goes to the question of why this case should not be brought in this jurisdiction. General Ansell has not argued his plea in bar on the ground of double jeopardy.

The Court: If I understand the gist of his contention on his motion for continuance, it is not that he is entitled 122
to continuance as a matter of right, but he is addressing himself to the discretion of the Court upon the theory that it would be unfair to his client to force him to trial here today prior to the time that the court-martial trial has been concluded and he informed of the result. I would like to hear you on that.

Mr. McGohey: I think, your Honor, that it later came out in General Ansell's presentation that while he may not have received any official certificate or notice of any kind from the army, there is no doubt that what has happened with respect to Radovich's court-martial is this: that the decision and sentence of the Court has been reviewed by the Judge Advocate General and that the Judge Advocate General has in effect set aside the conviction for errors of law committed by the law officer of the court or by the 123
court. I may be inaccurate in stating that because I am not sufficiently familiar with the technicalities of court-martial procedure, but I have read the decision.

The Court: Read it where?

Mr. McGohey: Sir?

The Court: Where did you read it?

Mr. McGohey: I got a copy of it from the army, your Honor. I have it in my office.

The Court: Has the defendant been apprised of that?

Mr. McGohey: I don't know, your Honor. I don't know.

Mr. Ansell: No, your Honor, we have heard nothing.

The Court: I so understood.

Mr. McGohey: I make no claim to that. But I did understand General Ansell to say that there can be no real doubt that on review the conviction has been reversed.

The Court: There was some far from laudatory comment which he had upon the conduct of the court-martial.

Mr. McGohey: Your Honor, I shan't make any comment on that. I wasn't there, and whatever was done was done, and it requires no defense from me. I have no part of it,
125 I was no part of it. And while I am about that, your Honor, may I just digress for a minute to say I was informed this morning in the courtroom downstairs by the defendant Radovich that he had an order from the United States Army to report to me for duty, and I informed the Major that I was not an officer of the United States Army nor did I have any duty for him to perform. I would like to explain how I think that came about. During the war, your Honor, it was necessary for some system to be worked out whereby prosecutors, whether a Federal Government prosecutor or county prosecutor or State prosecutor, could have available men who were needed as witnesses but who were then in the military or naval service. Now, in order not to have process servers running about the country and going to local commanders or to local stations and sub-
126 poenaing men to appear in court at times when that might conflict with their military duty, a system was worked out by the Attorney General and the War and Navy Departments whereby if any governmental official wanted for any purpose the appearance and the presence of a member of any of the services, he was to communicate that fact to the Department of Justice and from that point on arrangements would be made with the services to have the men available if their availability did not too seriously conflict

with military duties. I assume it was in pursuance to carrying out that arrangement that this order was issued. But again, your Honor, that is nothing with which I have any concern.

So let us get down to this matter of appeal to your Honor.

The Court: As a practical matter, what is he doing, that is, Radovich?

Mr. McGohey: He is here, your Honor.

The Court: Is he in any kind of custody?

Mr. McGohey: That I don't know, your Honor.

The Court: Well, you know whether he is in yours?

Mr. McGohey: He is not in mine. Definitely he is not in my custody. I saw him sitting—I don't know whether 128
he is in the courtroom. Yes, there he is (indicating). I saw him sitting down.

The Court: So far as you know he is under no kind of arrest?

Mr. McGohey: Not as far as I know, your Honor, no. And certainly he is under no arrest that I have anything to do with, if he is, or confinement of any kind.

The Court: All right.

Mr. McGohey: Now, General Ansell says that he does not know what is going to happen here, and I will take his word for it. I don't know either. But I then raise the question, your Honor, how long must this case be continued? The crime here, as I think we will be able to show if we get into the argument of the plea in bar and the demurrer, the crime here is a separate and distinct crime. To be 129
sure, the evidence that the Government proposes to adduce before a jury here is the same, certainly the same kind, and in many instances the same witnesses that were used at the court-martial at Mitchel Field, and they will be if Radovich is tried again. The crime is distinct, the jurisdiction is distinct. I don't know when the army is going to move the case for trial. I don't know whether they are

going to acquit him, I don't know whether they are going to file new charges. I don't know anything about it at all. But I have what I claim, and I think I can sustain to be a valid indictment, that was returned by the grand jury of this district. I think that the continuances that have been had on the representation of counsel that they would be ready to go to trial justifies me in pressing for the trial of this case at this time. I urge your Honor in the exercise of your discretion on this motion to exercise it against the plea for both defendants and to direct that the trial proceed.

The Court: Let me hear from you. Do you wish to be
131 further heard from, gentlemen?

Mr. Ansell: No, I can't hear in this room, your Honor. I couldn't hear your Honor in this room.

The Court: I asked if you wish to be further heard from on your motion for continuance.

Mr. Ansell: Just for a moment, please, your Honor.

The Court: Would you mind addressing yourself to this: Leaving out the question of how this defendant, your client, has been treated by military authorities, tell me, sir, in what respect will his cause be prejudiced by a prompt trial of his case here today upon this indictment?

Mr. Ansell: Well, your Honor, it seems to me to be impossible for me or any other lawyer to know anything about the reasons—we can speculate—for reversing the court-martial proceeding. Supposing the proceedings were
132 reversed because there was a lack of jurisdiction in the convening authority, or the jurisdiction of the court-martial became divested during the trial? That would pose as a question: we would not be able in such a case to plead, perhaps, that he had already been put in jeopardy by a court of competent jurisdiction. Again, suppose it were for mild error during the trial, could the District Attorney, whom I am glad to say has shown me great courtesy, and I think we are going to get along splendidly, Mr. McGohey—

Mr. McGohey: I hope so, General. It will be my first experience getting along well with a General!

Mr. Ansell: Could the District Attorney or any other lawyer know the law of that case as laid down by the Judge Advocate General of the army in reversing the opinion? Would he know whether he was to be tried again or not, or ought to be tried, or acquitted? If he were acquitted we would certainly have one situation with respect to this plea that I would like to know about. If he were retried, ordered retried, we would certainly have a different situation.

Mr. McGohey has seen the opinion, so he stated or intimated. Your Honor, why haven't we seen it? Who is more 134
concerned in the trial of that case and the reasons for the disapproval, if it were disapproved, than the accused himself? Does he amount to naught in this case? Can I advise my client to prepare for another trial before that court? Can I advise him as to how we are to meet the indictment in this Court, utterly ignorant of what has transpired since his conviction was announced? It seems to me that I am just required to risk this man's liberty here by stabbing in the dark. I can't do that.

Now, Mr. McGohey said that he has had absolutely nothing to do with what the military authorities did, and I shall not refer to any criticism of them, though they ought to be criticized and will be ultimately, that he has had nothing to do with it. Therein Mr. McGohey differs from
the official report made by the Staff Command Judge Advo- 135
cate to General Hunter and repeated by General Hunter that this man was held there all that nine months at the specific request of the United States Attorney here.

This is the statement, Mr. McGohey. Now, you and General Hunter may quarrel with this if you want to, I know nothing about it; I know that you and General Hunter in all truth had a very close working arrangement, and here is what General Hunter's Staff Command Judge Advo-

cate said about why they kept this man in durance vile over all this time, the delay—it was high time that it be apologized for—in referring them, the court-martial charges, for trial, was the specific request of the United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused. That is in my motion, Mr. McGohey.

Now, Mr. McGohey says that I committed myself to try this case on September 2nd or 4th, after a local attorney had come here and entered a plea. It was arranged by us. Maybe paid for by us. He had to have somebody.
137 Mr. McGohey was pressing for trial. I am not quarreling with him. But we did not commit ourselves that we were going forward on September 4th. Radovich had to have somebody here because Mr. McGohey said he was going to press for trial.

Now, at that time we had supposed, and that was a reasonable supposition, that the military jurisdiction would have been exhausted, it would have determined what it was going to do and I could come here then and represent Radovich. Now, that is the extent of the commitment, your Honor. That is all there is to it, that we thought it would be disposed of. And the papers carried, as I remember it, somewhere about mid-August or probably a little before, the statement that the whole thing had been busted. I thought that we would be notified almost immediately.
138 We have never been notified. Mr. McGohey has. He has got a copy of the opinion.

I am sorry to take up so much time, your Honor, in this matter, but it is a matter which I feel intensely about.

Mr. McGohey: Your Honor, may I be heard on just one or two things?

The Court: Just a minute. Let me ask General Ansell something before I forget it. You stated awhile ago that this defendant might be prejudiced in the consideration

of his plea of former jeopardy by reason of the fact that not knowing what the action on the court-martial trial was, it might turn out that they had been divested of jurisdiction at some time earlier than the instance of jeopardy so to speak.

Mr. Ansell: Might have been.

The Court: But doesn't your plea allege to the contrary, doesn't your plea allege that your client has been put in jeopardy there, and wouldn't the Court have to consider that as true on a determination?

Mr. Ansell: I think your Honor is right about that. I took the report that I received, that there was error, error in the proceeding, and proceeded on that theory. But 140
that does not alter the fact, your Honor, that General Hunter has got to do one of two things, and under the Articles of War is himself subject to court-martial for any delay in the matter, and that is to retry Radovich right away—the language of the statute says that—or dismiss. I certainly think we are entitled to know, your Honor. I myself have read all the law that I could. The man here who is more familiar with criminal practice than I would know about it.

The Court: We have not got to that. But one point I wanted to ask——

Mr. Ansell: I think I ought to say this, your Honor. I did not stress it in my argument. But I have felt impeded and I have been impeded ever since this trial. I 141
am not going to criticize. But there is no communication between counsel and Radovich except through third parties. And Radovich is ordered to A, to B, to C, to D. I have no notice of it. And I can't get notice except through considerable delay. Whatever anybody else may think about it, I think the right to the assistance of counsel is one of the most sacred rights, as we all do, and I don't think that Radovich has had that. That is a different matter. But we have been practically impeded by all of

these military orders which in my opinion ought never to have been made.

The Court: Did you ask to say something, Mr. McGohey?

Mr. McGohey: Yes, sir.

The Court: I think I had better hear him, Mr. Keenan, because he might want to reply to what he says.

Mr. McCohey: I am quoting from the telegram which was sent to Judge Healey, and a copy sent to me, dated July 20, 1945, signed Samuel T. Ansell, a telegram sent from Washington.

Mr. Ansell: Would you read it all, Mr. McCohey?

Mr. McGohey: Yes, I shall.

143 "Your Honor: I address you in this unusual way, because the case is unusual, the situation is unusual, and this is the only way I can address you. I was Major Radovich's attorney before a court-martial which on June 29 convicted him and sentenced him to dismissal and three years' imprisonment; that case is now pending before the Board of Review in the office of the Judge Advocate General. A week or more later the United States Attorney proceeded to have Radovich indicted for what seems to be in fact, if not in law, the same offense as that of which the court-martial convicted him. The United States Attorney insisted upon almost immediate arraignment and I am advised that he now insists upon putting him on trial next Monday. Major Radovich has no money, his military confinement adds to his difficulty of obtaining enough to em-
144 ploy effective counsel, and he is without counsel. I was once an officer of the Regular Army and I admire Radovich for his exceptional gallantry against the enemy. I will defend him if it is made possible for me to do so, and I will do so without compensation. I must leave Sunday to attend a difficult court-martial trial in Texas in which I was retained in January. It will probably consume three weeks. I am a member of the bar here but not New York, but I will gladly represent Radovich if admitted there

for the purpose, and if the trial can be postponed until September 3, the earliest date that I can absolutely commit myself to. Radovich's present co-defendants were indicted months ago without Radovich. I see no earthly reason for rushing Radovich to trial and I believe that the reason given by the United States Attorney as related to me by Radovich, namely, necessity of sending certain military witnesses overseas, is untrue and that the United States Attorney is being imposed upon. I know that military commanders at Mitchel Field have, for an entire year, abused their powers over Radovich and subjected him to unlawful and cruel treatment. I have preferred a formal written complaint against them to the President, who is 146
absent. It seems clear to me that these same military commanders are pressuring the United States Attorney as a part of their campaign of crucifying Radovich. Radovich is entitled to justice, money or no money. He is entitled to a fair trial, including a reasonable time for counsel to prepare the case. I say that I will defend him not later than September 3. I urge your Honor to grant me that much time. I am sending a copy of this air mail to Mr. McGohey. I respectfully request you to pardon this method of addressing you."

Now, your Honor, I would like to repeat that sentence: "I say that I will defend him not later than September 3." I think, and thought then, that that was a commitment to be ready to go to trial on that day. But we didn't go to trial. That is a month ago, your Honor. And up to this 147
moment I have heard nothing from General Ansell nor from Mr. Robb, nor from anybody on Radovich's behalf, that any application would be made. I had heard nothing from the defendants Bayer or their attorneys until this morning. I assumed that I had firm commitments from counsel for all defendants to go to trial today, and I have here all of the Government's witnesses, some of whom have come from long distances.

The General read from a statement which I understand was made at the court-martial by Colonel Harmeling——

Mr. Robb: It is his report to the War Department.

Mr. McGohey: That the trial, court-martial trial, of the defendant Radovich was delayed at my request. That is substantially right. I don't deny that to your Honor. I did ask the army to delay trial of this man until the Government's investigations of the civil crimes were completed. When I say I had nothing to do with Radovich's punishment nor with Radovich's movement from camp to camp, that is what I am addressing myself to. In other words, nothing that I have done or nothing that anybody
149 in the civil side of the Government under my jurisdiction has done has been done for the purpose, nor, as far as I can find out, with the effect of, impeding or hampering Radovich in the preparation of his trial. And certainly General Ansell, I am sure, will not claim that I did any of those things.

The Court: All right, gentlemen.

Mr. Keenan: Your Honor, very briefly I want to refer to dates so that there will be no confusion on a matter of making firm commitments to try the cause and changing the position for no reason whatsoever except delay or any other reason.

The cause was set for September 2nd, not by my doing, but by an application that was made in some proceeding—
150 a telegram that was referred to just before by Mr. McGohey. I didn't wait until the 2nd of September to have an adjournment. I cannot at this moment state what day in August it was that I had.

Mr. McGohey: It was in August.

Mr. Keenan: But it was in August.

Mr. McGohey: Oh, yes.

Mr. Keenan: I do know that I happened to be in New York on the 15th of August, those days when we had considerable delay finding out whether the war with Japan or

the hostilities had ceased, and I don't know the exact day of V-J Day, but I know I was here and there was a great deal of excitement, and I think it was around that time or very shortly thereafter that I had this discussion with Mr. McGohey. I have attempted to make it clear that as long as the war was on I was under peremptory instructions from my client to seek no delay by bringing this boy or attempting to bring him home.

And to say that we have made no effort to get him back since then, if the learned District Attorney had encountered the same difficulties I had in getting any information from the United States Army at Washington or any place else as to these transfers alone, he would understand why I would not be optimistic enough to attempt to get the United States Army to send this man back home under such circumstances for testimony in a civil case. So that, to make it clear, up until after the hostilities, I couldn't ask for the return of this boy. My client would rather take whatever punishment the law permitted rather than subject the nephew and son to further publicity, such as I set forth in my affidavit, I regret to say, was even released from the official branches of the Government and appeared in Time Magazine and other instrumentalities of dissemination of information throughout the United States. So that up until the end of the Japanese hostilities I wanted the boys home, but I would not, as my client requested and demanded of me, ask for a continuance until after the war was over, and that is not so long ago, your Honor. I have had other things in the meantime. This is the first opportunity I have had. And since I knew, and I can state, that there was going to be an application for a continuance, I feel that I ought in representing my client, make this application, who have been the recipients of no soft treatment by the Government, your Honor. Following the analogy of General Ansell, that his client has been used as a football and passed from one jurisdiction to another.

my clients have been used as the same football, but they have been kicked from one indictment to another.

The Court: I shall pass on this motion for a continuance before considering anything else, don't you think?

Mr. Ansell: I think that would be correct, your Honor.

The Court: Well, would you let me have all of the documents which have any bearing on this matter? What about that affidavit?

Mr. Ansell: There was one observation, your Honor—you have been so patient—but so far as Radovich is concerned all that has to be done is for General Hunter to act, let us know where we are, just give me a reasonable time
155 to study the opinion that sent that back; if Hunter says he is to be retried, I assume that Mr. McGohey would know that it would be practically impossible to be here. If he is not to be retried, we will know that. So I am not asking for any indefinite extension, and my request is caused by the delay of General Hunter to take action on this case and which the Articles of War require him to have taken long ago.

The Court: Would you mind answering me a little further: from a practical standpoint, how would the publication of the final action on the court-martial affect your trial of this case here today?

Mr. Ansell: Physically, I presume it would not.

The Court: I did not say physically. I said practically, sir.

156 Mr. Ansell: Well, I haven't the grounds for the reversal. I think I ought to have that, your Honor, because that determines whether he is going to be tried right away again by Hunter within eight days.

The Court: How would that affect you here? General Hunter certainly can't take this defendant nor you out of this court until this court is finished with him.

Mr. Ansell: I know, your Honor, but it occurs to me that here upon a plea of double jeopardy, for instance—

that is the real plea here—I certainly ought to have the entire court-martial proceedings upon which I base that plea. It is now pending in the Court of Appeals, the War Department, so far as I know. I can't tell.

The Court: I don't quite follow you, sir, as to how the proceedings in the court-martial, that is, the details of the court-martial, and the reason for the reversal could affect the validity of your plea of double jeopardy here.

Mr. Ansell: If it were reversed for mere error, that would be one situation. If they directed him to acquit, I think that would be another situation. And, in addition, your Honor, and with the utmost frankness, I say to you it would not surprise me in the least. These military reversals and remands have this characteristic: you can add 158
to those charges whatever the authorities want to add.

The Court: Yes, but you couldn't make what they add a basis for a plea here; you could only plead what has taken place.

Mr. Ansell: Of course not, sir. But it seems to me, without being able to answer your Honor specifically, and I wish I could, because I am not here just taking up time, I want to see where we are at with respect to this military jurisdiction. If General Hunter acts today—did I understand the United States Attorney to say that he was advised as to General Hunter's action on this case or the Judge Advocate General, Mr. McGohey?

Mr. McGohey: The Judge Advocate General.

Mr. Ansell: If I can get the action of the military au- 159
thorities in my hands today and give me a reasonable time to orient myself, I am perfectly willing to be here and stand trial, your Honor.

The Court: Will you be more specific in what you mean by the action of the military authorities?

Mr. Ansell: I don't know whether this was sent back by the Judge Advocate General to General Hunter under

that article of war or not. I do not know whether it was reported to the Secretary of War and who took the action. They are two different cases. I think it is rather involved. We all fought it out before Congress, and I am not sure that the article is at all simple, but the Judge Advocate General can send it back with instructions to General Hunter and General Hunter can do two things, as I understand the statute, either order a retrial or take such other action, and the statute in that particular place says as he deems fit. The Secretary of War's action seems to go through different channels, but I do not see that the result differs.

161 Now, when it gets back to General Hunter, of course, the statute requires his Staff Command Judge Advocate shall be called in and advised, and the statute requires that we be given a copy of that also, and that we be given a copy of all papers.

You know, your Honor's questions, of course it must be obvious, are a bit embarrasing because I can't answer them specifically. But when a statute says that I am entitled to that opinion, that I am entitled to the Staff Command Judge Advocate's opinion, that I am entitled to be advised of the action that General Hunter takes, there is some reason for all that.

The Court: I think you have made it very clear to me. I am going to take a recess now, gentlemen, until 2 o'clock.

162 (Recess until 2 P. M.)

AFTERNOON SESSION.

The Court: Are you ready, gentlemen?

I have for decision, gentlemen, this: Motion for continuance, separate motions. I will first pass on the motion of the defendant Radovich.

Radovich's counsel, General Ansell, makes a number of assertions as to the treatment, which he criticizes severely, of this defendant by the military authorities. The question for me to determine is whether such treatment and the present status of the court-martial proceeding in any way prejudices the rights of this defendant as to his defense in the action pending here. I cannot find that they do. In other words, I cannot see how the defendant's right to make his defense to this charge is prejudiced by the situation which existed as to the court-martial. I have examined the plea of former jeopardy and the plea avers that this defendant has been convicted by a court-martial. In passing on the plea, in considering it at this time, I have 164
to take that, of course, as true, and I do not see how on the plea the defendant could put himself in a stronger position for consideration of the question of law presented. So I am going to overrrule the motion for continuance on the part of the defendant Radovich.

Also I am going to overrule the motion for continuance made by the defendants Bayer. Their motion is based upon an affidavit made by their counsel to the effect generally that Martin Bayer, the son of one of the defendants, should be here as a witness. I have examined the affidavit and although there are general statements that his presence and testimony are both desired and necessary, I cannot find any specific allegations or assertions of any testimony which he might give which seem to be material to the issue here involved. So I am going to overrule that 165
motion for continuance. Exceptions may be noted as to my rulings in both instances.

Now, what do you want to take up, gentlemen?

Mr. Ansell: I assume, if your Honor please, that we might proceed, ought to proceed, to the plea in bar.

The Court: All right. Now, let me see; the plea in bar applies, of course, only to your client.

Mr. Ansell: That is quite right.

The Court: How about the demurrer? Have all defendants filed demurrers?

Mr. Ansell: We filed a demurrer for Radovich. I don't know whether the other defendant has or not.

The Court: I believe you stated, Mr. Keenan, that you had made or desired to make some verbal motion or motions.

(Mr. Keenan spoke to Mr. McGohey out of the hearing of the reporter.)

Mr. Ansell: I am advised that the United States Attorney filed a demurrer to defendant Radovich's plea in bar, Mr. McGohey?

167 Mr. McGohey: Yes. That is a formal demurrer.

Mr. Ansell: A formal demurrer.

Mr. McGohey: Yes. And there is no question about the service?

Mr. Robb: No, we don't question it; we just didn't happen to get it.

Mr. Ansell: I find myself questioning whether, we having filed a plea, your Honor, and the United States having demurred generally to that plea, the proper procedure is not for Mr. McGohey to proceed.

The Court: Which way do you prefer it, sir? I don't think it will make a great deal of difference, because I am going to hear both of you first. I say which way do you prefer? I am going to hear both of you fully.

Mr. Ansell: I do not know that it makes any difference,
168 and I would just as leave proceed now as at any other time.

The Court: I am inclined to think that you are pulling the laboring oar. Go ahead.

Mr. Ansell: I think that is probably true of the demurrer.

The Court: I would think that his demurrer simply relieves you of any necessity of sustaining your allegation by proof.

Mr. Ansell: I suppose that is right. Off the record.

(Discussion off the record.)

Mr. Ansell: You know, your Honor, inasmuch as Mr. McGohey has briefed his demurrer, I am wondering if it would not be probably fairer to me if Mr. McGohey proceeded. I just told your Honor that I was perfectly willing to proceed.

The Court: Have you a brief which you wish to file?

Mr. Ansell: I have some points and authority appended to my brief—Mr. McGohey has actually briefed his demurrer; I haven't seen it, though; but don't you think that you ought to proceed, Mr. McGohey?

Mr. McGohey: Your Honor, I agree with your Honor that it does not make a great deal of difference who goes 170
first on the plea in bar and the demurrer filed to the indictment.

The Court: Do I understand that your brief is just now being filed and these gentlemen have had no previous copy of it?

Mr. McGohey: That is correct. The memorandum of points or legal references upon which I assume they are going to rely were appended to their papers which contain the plea and the demurrer.

The Court: And of which you have seen a copy?

Mr. McGohey: Of which I have seen a copy, and I have a brief in opposition to that which I have just this minute handed to General Ansell.

The Court: Then, under those circumstances, I will 171
ask you to proceed.

Mr. McGohey: I shall, your Honor.

Your Honor, the indictment here was filed on July 12, 1945, and it charges a conspiracy to defraud the Government of the right to the honest services of certain army officials. One of the alleged aims and objects of the conspiracy was to prevent privates Martin Bayer and Melvin Usdan, each of whom is related to the defendant Samuel Bayer, Martin Bayer being his son and Melvin Usdan

being his nephew, from being sent out of the Continental United States. On July 16th, 1945, the defendants pleaded not guilty to that indictment. On September 27th this year, and it was last Thursday, the Government received by mail from the defendant Radovich, or, rather, from his counsel, the following papers:

A plea in bar and a demurrer to the indictment. Now, the Government has in turn filed a demurrer to the plea in bar and the two demurrers, the defendants' demurrer to the indictment and the Government's demurrer to the plea, of course, both operate as admissions for the purpose of this argument of the facts alleged in the plea
173 in bar as well as the facts alleged in the indictment. So the sole issue on the argument of the appeal here is the legal sufficiency of the indictment and the legal sufficiency of the plea in bar..

The Court: Are you about to proceed both as to the question raised by the plea in bar and the demurrer to the indictment?

Mr. McGohey: Yes, your Honor.

The Court: Very well.

Mr. McGohey: I think that will probably be the easiest way, to let me complete my argument at one time.

The Court: That is all right.

Mr. McGohey: Now the facts with respect to this case, your Honor, briefly are these, that on June 11, 1945, the
174 defendant Radovich, an officer in the United States Army, a major, was arraigned before a United States Army court-martial for two offenses, to wit, one, conduct unbecoming an officer and a gentleman, under the 95th Article of War; and, two, a charge under the 96th Article of War, and the 96th Article of War provides, and I am quoting:

> "Though not mentioned in these articles, all disorders and neglects to the prejudice of good order and military discipline, all conduct of a nature to bring dis-

credit upon the military service, and all crimes or offenses not capital of which persons subject to military law may be guilty, shall be taken cognizance of by a general or special or summary court-martial, according to the nature and degree of the offense, and punished at the discretion of such court."

Now, the charges that were filed against the defendant Radovich in the military establishment and by which he was charged before the court-martial represented identical conduct in each charge. The first charge is that:

"Major Walter V. Radovich (then Captain), Air Corps, did, at New York, New York, between 1 August 176
1943 and 31 August 1943, wrongfully and unlawfully accept and receive from one Samuel Bayer, the sum of $2,000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Headquarters and Headquarters Squadron, I Fighter Command, to Medical Detachment, Station Hospital, Mitchel Field, New York."

That is the first charge.

The second charge is that:

"Major Walter V. Radovich (then Captain), Air 177
Corps, did, at Goldsboro, North Carolina, on or about 1 December 1943, wrongfully and unlawfully accept and receive from Elias Bayer, the sum of $5000.00, lawful currency of the United States, for the purpose of effecting the transfer of Private First Class Martin B. Bayer and Technician Fifth Grade Melvin Usdan from Project Number CA-281 (First Air Commando Group), an organization then alerted for overseas

movement, to Second Ferrying Group, Second Ferrying Division, Air Transport Command, an organization not alerted for overseas movement."

On June 29, 1945, the defendant Radovich was convicted and sentenced for both offenses by the general court-martial.

Now, on the 12th of July, 1945, the grand jury in this district returned the indictment which is before us here, and that indictment charges the three defendants, Samuel Bayer, Elias Bayer and Major Radovich, with conspiracy under Title 18 of the United States Code, Section 88, with a conspiracy to defraud the United States.

179 The Court: Under the general conspiracy.

Mr. McGohey: Under the general conspiracy statute. (Continuing): "To defraud the United States of its right to the conscientious, faithful, disinterested and unbiased services and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud, and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich, an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

The indictment alleges the following, among others, as
180 the aims and purposes of the conspirators in the conspiracy charged in the indictment:

1. To make the acquaintances of various officers of the United States Army;

2. To make gifts to said officers;

3. To give sums aggregating $7,000 to the defendant, that is, the defendant Radovich, in order to induce him to

detach Privates Bayer and Usdan from units about to be sent out of the Continental United States.

A fourth aim is to conceal these transactions and conduct.

And a fifth aim charged in the indictment, fifth aim of the conspiracy as charged is to mutilate, alter and destroy evidence of the conspiracy and its purposes as contained in records, books and documents.

Now, eight distinct overt acts within this jurisdiction are alleged in the indictment.

Now, the defendant files a plea in bar and invokes thereby the Fifth Amendment of the Constitution of the United States which so far as material here provides that "• • • 182
nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb • • •"

And the defendant argues that the offenses charged against him before the court-martial and the offenses charged in the indictment at bar are identical. He also argues that the offense charged in the indictment is a conspiracy to accept and receive from Bayer the sum of $7,000, and that that conspiracy, as he alleges, it is pleaded, such a conspiracy is not indictable because the substantive offenses charged against the defendant before the court-martial, namely, the actual receipt of $2,000 on one occasion and $5,000 on another, those offenses, says he, were impossible of commission without the cooperative action which is charged in the indictment. 183

So that the Government argues, and will argue here, that the defendant's plea in bar and demurrer are precluded, first of all, by the defendant's plea of not guilty which was entered on the 16th of July; second, the indictment is legally sufficient, the Government contends; and, third, we contend that there is no identity between the offenses here charged and the offenses charged before the court-martial.

Now, as to the first point, that the defendant's plea in bar and the demurrer are precluded by the plea of not guilty

filed last July, I will take the liberty, although I don't think it is necessary, your Honor, to refer to Section 564 of Title 18 which provides:

> "• • • And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue and shall, without further form of ceremony, be tried by a jury."

That is the provision of the Code with which your Honor is of course familiar.

We claim that is a clear mandate in the statute and that it means that no plea shall intervene the plea of not guilty
185 and the jury trial, but that the issues raised by the plea of not guilty shall be tried immediately. Pleas and dilatory tactics in the forms of filing pleas or demurrers on the day a case is set for trial have been condemned repeatedly in the courts, and the cases in this district in support of that are cited there in my brief, so I need not refer to them.

Now, coming to the legal sufficiency of the indictment. The demurrer filed here says, first, that the indictment is vague and uncertain and does not set forth the nature of the right, including the services, judgment, and duty of this defendant, meaning Radovich, of which it is alleged the United States was defrauded.

Secondly, it is claimed that the indictment charges no offense against the United States, and that the offense
186 attempted to be charged being one in which agreement, with concert of action and purpose is an essential element, the charge of conspiracy will not lie.

Now I would like to address myself to the first claim that the indictment is vague and uncertain. We contend that the indictment is quite definite and quite certain and precise as to the right of which the United States was defrauded and the services and judgment of the defendant encompassed thereby.

The indictment alleges the right of the United States to be as follows:

> "* * * * right to the conscientious, faithful, disinterested and unbiased service and judgment of officers of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud and, more particularly, its right to the conscientious, faithful, disinterested and unbiased services and judgment of the defendant Walter V. Radovich as an officer of the United States Army, free from corruption, partiality, improper influence, bias, dishonesty and fraud."

The service and judgment of the defendant to which the 188
Government was entitled are clearly defined as follows in the indictment:

> "* * * * the defendant Walter V. Radovich, an officer of the United States Army, and a person acting for and on behalf of the United States in an official function under and by authority of the War Department, to wit, a Captain of the United States Army, with intent to influence the action of said defendant Walter V. Radovich and to induce him, in violation of his lawful duty, to transfer Private Martin Bayer and Private Melvin Usand, both soldiers of the United States Army, in order that the said soldiers would not be attached to and be members of a unit of the United States Army which was about to be sent out of Continental 189
> United States."

Now, I submit, your Honor, that that clearly defines first of all the right that the Government had and the duty which the officer had. Precisely the same kind of indictment, almost in identical words, was the indictment that was filed against the defendant Manton in this district some years ago. That indictment, its legal sufficiency was

attacked by a demurrer, and that indictment was sustained at the trial here. And in our Circuit Court in this district, and certiorari was denied on attempt to appeal that to the Supreme Court on the sufficiency of that indictment.

Now with respect to this double jeopardy or the identity of the offenses charged in the court-martial and the offense charged in this indictment. The Fifth Amendment proscribes double jeopardy in respect of the same offense.

The Court: Let me interrupt you before you get off that subject. Was the offense a crime upon which a trial was had in the Manton case conspiracy?

Mr. McGohey: Yes, sir. The charge was: The defend-
191 ants were charged with conspiracy to deprive the United States Government out of the honest conscientious service of Judge Manton of the Circuit Court. And the right alleged was the Government's right to his unbiased, unprejudiced services as a judge of the Court.

The Court: You of course cite that in the brief?

Mr. McGohey: Yes, that is cited in the memorandum.

The Fifth Amendment proscribes double jeopardy in respect of the same offense. There certainly is no constitutional limitation in respect to the repetition of the same evidence in support of different offenses. And I have cited cases in support of that proposition. The test rather is whether the required proof as to each offense is identical. And I have cited cases in my memorandum for that proposition of law.

192 Now it is clear that the same transaction may give rise to several offenses, for instance, possession and sale of the same liquor will support two offenses. The offense of unlawfully breaking into a post office with intent to steal and the offense of stealing may be predicated on the same act. The offense of conspiracy and a substantive offense can be, and indeed usually are, grounded on identical transactions. And the cases supporting those propositions, although they are fully familiar to your Honor, I am sure, are cited in this memorandum.

The mere fact that the evidence required to support one offense is or may be closely connected with and even similar to the evidence required in support of another offense, is immaterial with respect to this question of double jeopardy.

Now this indictment charges the offense of conspiracy to defraud the United States of its right to the honest services and judgment of officers of the United States Army. In proof of that charge the Government may adduce, among other proof, evidence of bribery or extortion involving the defendant Radovich. The fact that the defendant has been convicted before a court-martial of what is tantamount to the offense of bribery is not, however, in any sense in our judgment a bar to the indictment here. This indictment 194
does not charge the defendant Radovich or anybody else with the offense of bribery, and the defendant is not subject to punishment for bribery on conviction for the offense of conspiracy. It is certainly not necessary to establish a criminal act in support of the offense of conspiracy. If the overt acts are not criminal, the offense of conspiracy could nevertheless be completed and indictable.

Now, an acquittal in respect of a conspiracy of course does not preclude an indictment for bribery, and by the same token a conviction for bribery would not preclude a conviction for conspiracy. The two, the substantive crime and the conspiracy to convict the crime are certainly distinct, and that is well settled law.

Now in this case eight overt acts are alleged, none of
which constitutes bribery and any one of which would be 195
legally sufficient to complete the offense charged after the unlawful conspiracy had been established.

The offense which we charge, the offense of conspiracy, requires proof of agreement among the defendants to defraud the United States of the honest services and judgment of this defendant Radovich. The offenses with which the defendant Radovich was charged before the court-martial required no proof of such agreement. The concert

required to establish the bribery is not the same concert required to establish the agreement here charged. The authority for that is again found in that Manton case which I have cited to your Honor, because precisely this same argument was made in the Manton case. When you come down to examine the Manton case you will find it was argued that what you had here was in effect a conspiracy to bribe a United States judge, and that was argued at length. The Circuit Court with respect to it said:

> "The indictment * * * charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to
197 be a way of consummating the conspiracy * * *. The long argument upon the point consequently falls for lack of foundation to give it support."

Precisely the same argument that is being made here was made in an attack upon the indictment in the Manton case, and the sufficiency of the indictment was sustained.

The defendant further argues as if one of the objects of this conspiracy, namely bribery or extortion, is the conspiracy charged in the indictment, and clearly that is not the fact. Bribery is not charged here. Conspiracy to defraud the Government of the honest, faithful, conscientious service of this officer is all that is charged in this indictment.

198 Now the defendant's chief reliance is on a case in the United States Supreme Court, back in 206 U. S., the case of Grafton v. United States. General Ansell quoted that to your Honor this morning and he relies on it in his papers. Now, a mere statement of the facts in the Grafton case will immediately show the difference between that case and this one.

The Court: I had an opportunity to glance at it quite hurriedly during lunch hour.

Mr. McGohey: Then your Honor is familiar with it.

The Court: Superficially.

Mr. McGohey: The facts are these: A soldier on duty some place in the Philippines back in the early part of the century shot either one or two persons, I am not sure which, and killed them.

The Court: I do remember the facts.

Mr. McGohey: He was tried, as your Honor knows, before the court-martial for the crime of murder and he was acquitted by the court-martial, and immediately, or shortly after, he was indicted in the civil jurisdiction for a crime called assassination by terms in their statute, but clearly the things were precisely the same; assassination was the killing of the human being, the murder for which he was charged in the court-martial was the killing of a human being. There was no difference whatever between the crimes charged. 200

The Court: There was a difference between the crimes. Homicide was an essential element of each.

Mr. McGohey: When I say "crimes" I don't mean the technical language of the statute. I mean that what the man was charged with in each instance was the killing of a human being. And the court of competent jurisdiction, the military tribunal, heard the evidence and returned a verdict of not guilty. And then it was sought to have any other tribunal possibly find a verdict of guilt for the same offense on precisely the same evidence.

Now the reading of the Grafton case clearly distinguishes it from this case here. It is true that the evidence that will be submitted here will be largely the same kind of evidence as was submitted at the court-martial, but, as I have said before, and as the cases which I have cited to your Honor really hold, the mere similarity or even identity of evidence does not at all affect the nature of the crime and does not make the crimes the same. So that the position of the Government, if your Honor please, is that there is 201

no double jeopardy in this case, and, secondly, that the indictment as an indictment is a good and sufficient indictment under the authority of the cases that I have cited.

Mr. Ansell: If your Honor pleases, as I followed the district attorney's argument I thought his first point was that we were too late in filing our plea of former jeopardy after we had pleaded not guilty. I have a distinct tendency to refer to the United States Attorney's argument upon any such point, because he must be and is so familiar with questions that arise in the course of criminal trials. But in this particular case a plea of double jeopardy I assume, without knowing, they do not frequently appear. I don't
203 know that it is at all helpful to your Honor, indeed I think it is not helpful and resolves itself into nothing but an expression of professional opinion based upon recollection of cases, for me to say that my view of the seasonableness of the submission of the plea of double jeopardy is that it can come in at any time.

The Court: Suppose we do not take up any more of your time on that question, sir, because there has been lack of diligence in the filing of these pleas; if after submission to a jury I became convinced that there should be a plea I would bring him in and consider it and if I became convinced that an indictment was not sufficient, I would pass upon the question at any time during the trial.

Mr. Ansell: Mr. McGohey has run together the argument in opposition to the plea of double jeopardy and I
204 have some difficulty in extracting that argument and assigning one part of it to one thing and one part to another, but I have followed his points and his purposes. First, as to the Grafton case. I have not said, your Honor, that the Grafton point is in point upon the very question raised here. I resort to the Grafton case to establish first that there can be double jeopardy as between the trial before a court-martial and a civil criminal court.

The Court: It certainly holds that.

Mr. Ansell:—It certainly does. The case is enlightening I should say perhaps for information. The Government of the United States has gone along from the time it came into existence until 1906 trying men for the same offense, but one being under the military code and one being under the civil code, that is, a criminal code of the United States; that, inasmuch as the same actions violated the military code and the civil code, using that term as indicated, there was no double jeopardy because Congress had said in effect that the same act would violate two different statutes. And, as strange as it may seem, that had gone along from 1789, I think, or shortly thereafter, until 1906, when Justice Harlan wrote that opinion for the Supreme Court. And 206
we saw, the Army saw at least—I contributed something to the Grafton case for Grafton—the Army saw nothing unjust in that because the Army erected itself into a different world, a different system of law and jurisprudence from that which governs us all.

If your Honor please, I suppose that every system of law has its own peculiar terminology, it has its own technical terms that requires some knowledge to become initiated in it. Now, as Mr. Justice Harlan pointed out in that case, as your Honor will find near the conclusion, because that was stressed in the argument for the War Department, the War Department said that it is almost impossible in many instances, in any event, to compare the allegation or specification of the military charge and specifications to the civil charge and specifications, because of the idiosyncrasies in 207
language of the two systems. It was pointed out in the brief, in the law edition, at any rate the briefs are pointed out, and it is true, said the Department of Justice and the War Department, that conduct unbecoming an officer and gentleman—what is it? It is common law of the military—whatever a court-martial says constitutes conduct unbecoming an officer and a gentleman that does constitute conduct unbecoming an officer and a gentleman, because

they proceed in accordance with the precedents and customs of the service that constitute the common law of conduct unbecoming an officer and a gentleman.

They said also that the 95th Article of War—your Honor will observe that in the time of the Grafton decision the corresponding articles were numbered 61, for conduct unbecoming an officer and gentleman; 62 for what is shortly called conduct to the prejudice of good order and military discipline. But Justice Harlan pointed out—as a matter of fact, I think he went through the Civil War and knew something about it, probably, more than most of them had knowledge, and he gathered from his own knowl-
209 edge and the briefs of counsel in the matter that the old 62, now the 95th, Article of War is a great hodge-podge; it specifies in the charge "conduct to the prejudice of good order and military discipline," whatever that may be, "offenses of a civil nature not capital"; and there you look to the penal code, and even to the penal code of the several states, if it be such a matter that a court-martial can say that that does reflect discredit upon the officers of the Army of the United States.

The textbooks and digests in the military establishments mean rather more than textbooks in our civil practice. The textbooks are all to this effect and so are the digests and so are the customs of the service from the beginning, that any violation by an officer of the Army of
210 the penal code of the United States is also conduct to the prejudice of good order and military discipline or an offense less than capital against this military code.

Now whether the specification, the military specification, charges bribery or not, technically, it charges, if it does charge bribery, an offense against the penal code of the United States, and that is in violation of that article. If it charges conduct in the nature of bribery, it also is conduct unbecoming an officer or a gentleman or an offense

But the textbooks and the digests and all the years of service in the military establishments show that any fraud against the United States committed by a member of the Army subject to military law, any fraud against this Government, is chargeable and convictable under the 96th Article of War. You do not have to use the term, your Honor, "fraud," you do not have to use the word "bribery," you do not have to say that he did something in violation of a section of the penal code. It is common law generally if this Court finds that this officer soldier did anything which you would ordinarily call fraud, that is, the accomplishment of an evil purpose by trickery or evil design or so forth, that violates this section. It makes no 212
difference what language you use. And even if it should be found by the court-martial that Radovich did not actually receive this bribe but nevertheless did conspire to receive the bribe, though fell short of receiving it, then it is a time-honored method, approved by the Army from the beginning and by the civil court—they have taken notice of that fact—you just strike out the actual consummated offense alleged, and if the evidence proves that an attempt was proved or that a conspiracy to do that thing was proved—just change the two words—it is done daily in the Army of the United States—you would be caught anyway, if, whatever the evidence shows, in the judgment of the court-martial, with its military precedents, it constitutes a violation of this common law article.

I do not know whether I follow the district attorney's 213
test. When we come to double jeopardy everybody talks test, test, test, until my head gets to ringing with "test". We are attempting to determine identical offenses. I assume offenses that are substantially identical; I assume that we are not going to strain this great constitutional guarantee and protection through such a fine sifter that we will neglect the substance of the matter.

Now look at the Grafton case. The United States Attorney, through inadvertence of course, when he said that the court-martial tried this soldier for murder. It being a time of peace, the war and insurrection being over, he could not have been tried for murder. In times of peace the military authorities cannot try a man for murder. What he was tried for was a degree of homicide which the court found to have been included within the crime of assassination which we commonly call murder, not exactly the murder at common law. It is Spanish law, your Honor, and we have done our best to conform of course the Spanish code to our own system of law, really, with great
215 success, I think. Homicide is really a will to do all of this, as we say, with malice aforethought. The court-martial was perfectly willing that the civil authorities should try this man. They knew they couldn't try him for murder. But the civil authorities at that time made no motion to try him. Therefore, the court-martial tried him. It was a case of shooting and killing these two people. He said in the line of his duty he killed them. He was tried by the court-martial for what he could be tried for, that is, something less than murder. And he was tried later by the civil court for something greater than what he was tried for, although the terms were not as accurate as ours are. We know that homicide is a lesser offense than murder. There, it is not quite so plain
216 under the Spanish code and never has been. But our court-martial charged him clearly with the unlawful taking of a human life. Of that he was acquitted. And the civil court came along and thereafter tried him of murder, as we would call it at common law, and they did it on the theory that they were following these two separate jurisdictions, one military and the other civil. And Justice Harlan said no and the Court said no, and it has been adhered to ever since.

Now in this case—in this case, your Honor—the charge is cryptically a violation of the 96th Article of War, that means a common law military. If "fraud" had been written in there it would have been fraud against the United States in violation of the 96th Article of War. If bribery, technically bribery under the penal code had been charged, it then could have been written, "Bribery as denounced by a certain section of the penal code in violation of the 96th Article of War." If conspiracy had been charged, or if the evidence had proved conspiracy but fallen short of proving the actual receipt of the bribe as the result of the agreement, that also would have fallen under the 96th Article of War. 218

Now that specification charges that Radovich received a certain sum of money from one of these co-defendants for the purpose of effecting the transfer, engineering the transfer of these men from a danger spot to a soft spot, if I may use that language. Now, it did not seem to me that the United States Attorney really touched upon a point I had hoped that I made in my points on authority. It is this: If we charge a man with the actual receipt of a bribe for this purpose, if we charge Radovich, as we did, with the receipt of this money for the purpose of effecting the transfer of these men from a dangerous to a soft spot, whether you call it bribery or not it makes no difference, it is the receipt of money from John Smith to Radovich for the specified purpose, and it all connotes 219 and necessarily connotes, a concert of action, an agreement between John Smith and Radovich, with the same thought, to the same purpose, the same end. Now the cases are almost legion to the effect that if the Government charges an accused, a defendant, with an offense that necessarily involves this agreement, this concert of action, this unity of thought, this same evil purpose agreed upon, they have charged all that can be charged,

and they can't come along and say, specification 2 or some other count in the civil side, charging you with having received from John Smith $1,000 for this unlawful purpose, understood by all; you can't come along then and say, specification 2 or count 2, you conspired to do that. Because whatever the language the Court used, they used a concourse of action, this sameness of thought that it had to be—that I can't receive money from John Smith to do this, to say that these men are transferred thus and so without having conspired with John Smith to have received that money for that purpose; and when I charge the receipt of money for that purpose I have also charged
221 him with a conspiracy. I have cited the cases in my brief.

I think, your Honor, getting rid of all the learning, the Latin terms used and quoted by the Supreme Court of the United States in at least two instances, converse and so forth, getting rid of that and getting down to brass tacks it seems to me that the reason why you can't charge—indeed it is said by the Court; I won't say "by the Court"—that the reason why you can't charge this completed act which necessarily involves this unity of action, understanding and purpose, is that the legislature has said, has fixed a punishment for that act and you can't string it out by calling it by a different name and give it some other punishment. Or if we want to pursue the common law concept, and as I read the books, this very thing is civil law rather
222 than common law perhaps, adopted by us, it is: Wherever you charge a man with having received a bribe from John Smith for an evil purpose to defraud the Government you have likewise charged him with the lesser included offense of the conspiracy, and you can't charge him separately and independently with both.

With all due respect to Mr. McGohey I would like to address myself for a moment to Manton case, the judge of the Court of Appeals here.

The Court: Let me interrupt you for a moment. It is now 3 o'clock, gentlemen, and I see very little likelihood of my hearing you as fully as I want to and read these cases and going into a further trial this afternoon, so it is my disposition to excuse the jury until tomorrow morning.

Mr. McGohey: That would be agreeable to the Government, your Honor.

The Court: No matter how I may rule I don't want to do it hastily, I want time to consider.

So will you notify the docket commissioner that he may excuse this jury until tomorrow morning as far as this case is concerned.

Mr. Ansell: Your Honor, we have some military witnesses here. I don't like to be responsible for keeping them here, and there is no reason why they shouldn't go home now. 224

The Court: All right. As far as the Court is concerned I see no point in any witnesses being advised to stay. There is no possible question of fact which may arise on these motions.

Mr. Ansell: I was wondering this, Judge. I don't want to interfere with the procedure—they are about an hour and a quarter, I understand from here, and I wonder if we might have sort of an understanding that they need not come, that they may stay in their offices, until we see, or think we see, about what time we will need them, and we could then telephone them. 225

The Court: Are they defendant witnesses?

Mr. Ansell: They may be. They are ours. Certainly the s I see here are ours. They may also be the Government's. I don't know.

Mr. McGohey: No, they are not. Are you referring to Colonel Harmeling and Colonel Miller?

Mr. Ansell: Yes.

Mr. McGohey: The Government has not called those gentlemen as witnesses.

Mr Ansell: They are mine, then, sir.

The Court: I have no disposition at all to put these gentlemen to any inconvenience, but I have no inclination at all to have the Court and jury wait while some witness is called. If you can guarantee you can get them here by the time they will be needed, I have no objection.

Mr. Ansell: I think your Honor is quite right about that, and I think it will be an imposition if I promise to get them here and I couldn't get them here. So I think I will have them here, because there may be need for them, and there we would tie up the procedure of this court.

The Court: Suppose we take a very short recess right
227 here. Let us take a ten-minute recess here. Recess until 3.15.

(Short recess.)

Mr. Ansell: I was about to say, your Honor, with respect to the Manton case, the argument or contention was made there quite as Mr McGohey said. But there all that was involved was, as I understand it, a simple matter of pleading. Judge Manton was charged really at great length, cases that were coming before him, page after page after page in the indictment, with a conspiracy to defraud the United States by various and divers means, page after page of that also; and the contention was made in behalf of Judge Manton that there was duplicitous pleading there, that he was charged in one specification, one paragraph really, of the indictment with both defrauding the
228 Government of his honest judicial services and, too, said the contention, also with bribery. The Supreme Court in that case said this: No, the Judge is charged with defrauding the United States by having all these cases before him, or probably would have them all before him, and that the method, bribery, was only auxiliary to it, was a mere incident that is not charged with the bribery as a substantive offense.

The Court: Isn't that somewhat analogous to your situation here?

Mr. Ansell: No, your Honor, because here we have two substantive charges, and I say that even the——

The Court: You mean in the court-martial?

Mr. Ansell: In the court-martial proceeding and this proceeding you have two substantive charges. You don't say that this bribery charged here is alleged as a mere auxiliary as, says the Supreme Court, it might be said in a conspiracy to murder, you might say, by means of a shotgun. I say in this case, your Honor, we have got in the court-martial a charge of defrauding the Government of the United States under 62, 96th Article of War, that 230
that includes—that very specification includes the conspiracy, the very conspiracy that is alleged here. The prime means that is alleged in Mr. McGohey's bill of indictment was, it was a part of this conspiracy, it was the part of the conspiracy, it was the gist of it, that this bribe should be given and received. That is set up as an independent charge; nothing auxiliary about it.

I have said, or tried to say, that you can't charge bribery and conspiracy to give or receive a bribe, and if you look at the 96th Article of War you can't charge fraud of the United States Government, using that term, without charging it under the 96th Article of War. The only specific charge of fraud against the Government of the United States upon the part of anybody in the military service is 231
found in the 94th Article of War, an old Civil War article which had to do with defrauding the Government of money, property, not such things as we are talking about here—influence, judgment, duty and so forth. The only conspiracy to defraud that is specifically set out by the article of war is also the 94th; defrauding the Government of the United States of money, material, false claims and so forth for money, a conspiracy, thus to defraud the Government of the United States under the 94th. All other

frauds, all these frauds, defrauding the Government of the benefits, the judgment, duty, services of its officers through trickery, bribery, or whatnot, are chargeable under the 96th Article. And I say that Major Radovich was charged with fraud against the Government of the United States.

The Court: But don't you have to go a little further? Was he not charged with a specific fraud in that he did receive a bribe?

Mr. Ansell: Let us take that specific fraud in that he did receive a bribe. Probably your Honor was ahead of me in thought. I think you were. Charge of fraud, a vio-
233 lation of the 96th Article of War, in that he did accept a bribe for the purpose of engineering the transfer of these boys from a danger spot to a soft spot.

The Court: But the specification does not go that far—yes, it does.

Mr. Ansell: Yes.

The Court: I will just ask one question to save myself some trouble. Are the specifications, the two specifications, under each charge identical?

Mr. Ansell: Yes, your Honor, because in order—do you follow it, sir?

The Court: Yes.

Mr. Ansell: I was getting rid of a little and only a little verbal differences, that this officer was charged with committing a fraud against the United States by receiving a
234 bribe to engineer the transfer of these soldiers to a soft spot. What was the fraud against the United States? What is a fraud against the United States as set out in the bill of indictment? Why do we get captivated by mere words? The fraud against the United States was the deprivation of the United States of the duty, loyalty and so forth, good conduct of Radovich, because, forsooth, he accepted a bribe that seduced him away from his duty to

the United States. And in the court martial, I say under the 96th Article of War, we say fraud, defrauded the United States—that is the charge, specification, a peculiarity of their language, in that he did receive a bribe for the purpose of engineering these men's transfer. That was the fraud against the United States. There is nothing else here.

I wish that we could divest ourselves of the mere difference in language between civil and military indictments. I wish we could so divest ourselves that we would get right down to the bone and marrow of this thing. Now I say that in the military charge if we said fraud were specification 1, in that he did receive a bribe for the purpose of transferring these men, that they could not have pleaded then—of course they could, but a lawyer would have stricken it down—in that he did conspire to receive the bribe, the second specification being necessarily included in the first. Now if the military charge can't say that, if our law says that you can't charge a man with the receiving of a bribe, which necessarily involves a conspiracy, that you can't put in specification 2, in that he did conspire to receive the bribe, then most assuredly you can't put in specification 2 over on the civil side of the docket, because specification 2, the conspiracy to receive the bribe, is wrapped up in specification 1. And I have cited cases for that, your Honor.

Your Honor is wonderfully patient. The subject is of great interest to me.

The Court: It is of great interest to me.

Mr. Ansell: Naturally we talk these things over, all lawyers do in offices; and it was one of the most interesting things to me to chase down the history of the law wherefore we could not charge a man with bribery, receiving a bribe I mean and conspiracy to receive a bribe, because the second was involved in the first. And the Supreme Court went to great length and great learning in discussing that question with a great deal of references to it. But I am con-

vinced that is the law. And I am convinced myself, your Honor, which means nothing, except that I have the courage of my conviction, that when Mr. McGohey indicted Radovich for fraud in that he did receive this bribe for this purpose——

The Court: That is not just the way he does.

Mr. Ansell: Fraud against the United States.

The Court: He indicted him for conspiring to defraud.

Mr. Ansell: I say, if he had done that—I am taking the hypothesis—if he had charged this fraud against the United States, charged that Radovich accepted the bribe, having done that he could not then charge separately and inde-
239 pendently fraud against the United States in that Radovich conspired to defraud the United States by accepting this bribe, though he never got it.

I hope your Honor follows it. Whether your Honor and I see eye to eye on it isn't the point. I am trying to make my point stand up.

The Court: I am very much interested in what you have to say, sir.

Mr. Ansell: It is not the Manton case at all.

The Court: It certainly has some analogy.

Mr. Ansell: Oh, certainly it does, sir. It has a kinship.

The Court: Looking at the case stripped of verbiage, the gist of the offense which Judge Manton was accused of committing was accepting bribes, wasn't it?

240 Mr. Ansell: What was that, sir?

The Court: I say, stripped of a lot of verbiage, is it not fair to say that the gist of the offense which Judge Manton was accused of was accepting bribes?

Mr. Ansell: A conspiracy to accept a bribe.

The Court: That is not what he was indicted for.

Mr. Ansell: That is what he was. I say, suppose your Honor, that the indictment had been acceptance of the

bribe, the question is, could he also have been indicted for conspiracy to accept the bribe?

The Court: The Circuit Court seems to have answered that question by saying that he was not indicted for accepting a bribe——

Mr. Ansell: Quite right.

The Court (continuing): —he was indicted for conspiracy to deprive the United States of his honest services, and the means was the acceptance of the bribe—the incidents.

Mr. Ansell: That was the auxiliary.

Now, in this case Radovich was indicted, I say, for fraud against the United States for accepting a bribe. The only 242
fraud against the United States was the transfer of these men and seducing the officers to make that possible. I think, your Honor—I don't know where we are going to come out, but I think I can say this, that the evidence to sustain the court-martial charge would also sustain the indictment if that was the test conversely.

The Court: A man convicted for removing and concealing distilled spirits did not do but one thing, but he was convicted and punished both for removing and for concealing.

Mr. Ansell: That was in the days I imagine of prohibition.

The Court: No, sir. This was afterwards.

Mr. Ansell: Well, unquestionably the Legislature can put in verbiage and that verbiage and that word, they 243
may be different offenses, but that is not the situation here.

The Court: That is my problem.

Mr. Ansell: We have the cases, even in the days of the prohibition era, not speaking of it I hope with disrespect, but, all the same, they were strange decisions. The seller and the purchaser of liquor in those days, the statute

said, "sell and buy", but the Court said it was not the intention of the Legislature to make the purchaser amenable. But in this case we do not get into all of that, your Honor, in my opinion. There are certain offenses, they are few, but they are all pointed out. I guess in the field of fornication and adultery, the author seemed to comment upon that, two people have to be engaged in the same act, and they have to agree because you cannot be indicted, the guilty parties cannot be indicted, for the evil conduct and for conspiracy to commit that evil conduct. Now, some people on the outside might have considered that this should take place but not with the two people in whom the concert
245 of action was necessary.

The same way with bribery. If you are indicted for the receipt of the bribe you cannot be indicted for conspiring to receive that bribe. My associate says he doesn't think—of course, we have said this so much, your Honor, it is nothing new—that the Manton case is in point in the matter of double jeopardy. I think your Honor will see that when you analyze it. I can't help you. I say it is not in point. I thank your Honor very much.

The Court: Do you wish to be heard, Mr. Keenan?

Mr. Keenan: I don't care to be heard, sir, at this time.

The Court: Do you wish to be heard?

Mr. McGohey: No, I have nothing further to offer.

The Court: All right, sir. Would it not be convenient for you gentlemen of counsel to be here at 10 o'clock to-
246 morrow morning?

Mr. Ansell: We will be here at ten.

The Court: The regular hour for the convening of this court is 10.30, but I would like to have you here at ten so that I may rule upon the questions which have been submitted in time, if I should rule adversely to the defendants, to go ahead with the jury trial at 10.30.

All right. Is there anything else for this afternoon?

Mr. McGohey: No, your Honor.

The Court: All right, then, this Court will take a recess until 10 o'clock tomorrow morning.

(Adjourned to Wednesday, October 3, 1945, at 10 o'clock A. M.)

New York, October 3, 1945,
10 o'clock A. M.

TRIAL RESUMED.

The Court: Are you ready to proceed, gentlemen?

Gentlemen of counsel, I have for decision this morning 248
two questions: First, the question raised by the demurrer to the indictment, the second, the question raised by the plea of former jeopardy or autrefois convict filed by defendant Radovich, and the Government's demurrer thereto.

As to the demurrer to the indictment, I overrule the demurrer, as it seems to me that the indictment clearly sets out an offense under Title 18, Section 88 of the United States Code Annotated, which is commonly referred to as the conspiracy statute, and that the allegations of the indictment are sufficient and definite.

As to the plea of former jeopardy, filed by defendant Radovich, he asserts therein that he has heretofore been tried by a court-martial and convicted of substantially the same offense as alleged in the indictment here, and that 249
by virtue of the constitutional provision against double jeopardy, this prosecution must be dismissed. The Government, by its demurrer, admits the specific facts set out in the plea, but contends that the offense here charged is a different one, and therefore the constitutional provision against double jeopardy does not apply.

The defendant contends that, since court-martial and district courts are courts of the same sovereign, that is, the United States, the constitutional inhibition against

double jeopardy applies to prosecutions in such courts. Grafton v. United States, 206 U. S. 333. I agree with this contention. So the crux of the situation here is whether or not the offense charged against Radovich in the indictment here is substantially the same as the offense for which he was tried by a court-martial. Simply stated, the record of conviction by the court-martial shows that defendant Radovich was convicted of accepting bribes from his two co-defendants here, for the purpose of effecting transfers of certain soldiers. By his counsel, he asserts that the offense charged against him in the indictment here is that of conspiring to accept such bribes which was by necessary
251 implication included in the offense of which the court-martial convicted him.

It is well settled, as a general rule, that the substantive offense of violating a statute or defrauding the United States, and conspiring so to do, are separate and distinct crimes, and convictions may be had on both offenses. However, defendant urges that the crime of accepting a bribe necessarily implies a concert of action, which amounts to conspiracy between the giver of the bribe and the acceptor thereof, and, further, that inasmuch as the indictment here is essentially an indictment for conspiracy to accept a bribe, the offense here charged is substantially the same as the offense for which defendant was tried by a court-martial. I find it unnecessary to decide whether or not a prosecution for accepting a bribe precludes further prose-
252 cution for conspiracy to accept a bribe, because I am satisfied that the offense charged in the indictment here is not the offense of conspiring to accept a bribe. The offense here charged is that of conspiring to defraud the United States of its right to the conscientious, faithful, disinterested and unbiased judgment of an officer of the United States Army free from corruption, partiality and so forth, and more particularly "its right to the conscientious, faithful, disinterested, unbiased services and judgment of the

defendant Walter V. Radovich as an officer of the United States Army free from corruption" and so forth.

It is true that the matter of the bribe is involved in the conspiracy charge, but the indictment does not charge the giving or receiving of bribes as a substantive offense, nor does it charge a conspiracy to give or accept bribes. Of the indictment here, it seems to me that it may be fairly said, as was said of the indictment in the Manton case, 107 Fed. (2d) 834, at page 839:

> "It charges a conspiracy to obstruct justice and defraud the United States, the scheme of resorting to bribery being averred only to be a way of consummating the conspiracy and which, like the use of a gun to 254
> effect a conspiracy to murder, is purely ancillary to the substantive offense."

It is therefore my conclusion to sustain the Government's demurrer to the plea of former double jeopardy filed by defendant Radovich.

Mr. Ansell: I assume we may have an exception to that, sir?

The Court: Exception may be noted.

Now are you ready to proceed with the trial, gentlemen?

Mr. McGohey: The Government is ready.

The Court: Let me make an inquiry. I find that in every jurisdiction which I sit the method of impaneling a jury differs. In my own jurisdiction I do all of the interrogating of jurors on the voir dire. I know in Washington the 255
practice is different; the practice is usually different here—counsel do the interrogation. Is that not correct?

Mr. McGohey: Not as a rule, I think, your Honor, except that some of the judges allow counsel a little more leeway than others. Some of our judges here insist on doing all the examining and insist that any questions which counsel wish to put to the jurors be put through the Court. Other judges, however, leave them perfectly free to examine.

The Court: Since you mention it, in this court I have done it both ways. What is the desire of you gentlemen of counsel first?

Mr. McGohey: My own view, your Honor, is that the Court should question the jurors and if the Court's questions do not cover such subjects as counsel feel need to be covered, then counsel might supplement that questioning with their own.

The Court: What is your thought?

Mr. Ansell: We agree with that. There was one question, and of course we do not care who would ask it, but it seems to us that the Court might well ask it if it would—
257 we wanted to suggest to your Honor one question on the voir dire. That is the only question that we can see now.

The Court: What is that?

Mr. Ansell: And that question is, in effect, phrased as your Honor may deem best, whether or not if it develops in this trial that the defendant Radovich has already been tried by court-martial and convicted for an offense growing out of the same transaction as this, whether that fact would so prejudice them that they could not fairly try this case. It seems to me it is almost necessary that somewhere along the line of this case that fact will come out on cross-examination or otherwise. We feel that in substance that question ought to be asked.

The Court: Well, I think it inevitable that there is going to be some reference to the court-martial trial; certain wit-
258 nesses will be asked if they did not make conflicting statements. It was my thought that it definitely should not come to the jurors' knowledge that there had been a conviction of anyone, and if I ask the question as you suggest it I will tell them that in the first instance. It seems to me it would be to the prejudice of your client.

Mr. Ansell: I have an idea that your Honor is probably correct about that.

The Court: I would not at all object to stating to them that it is going to appear in evidence in all likelihood that the defendant Radovich has been tried by a court-martial, that the result of that trial is immaterial and should not in any way be considered by them, and ask them if the fact that there has been such a trial would in any way influence their verdict. I think that is fair.

Mr. Ansell: We think that is correct, your Honor.

The Court: How about you, Mr. Keenan?

Mr. Keenan: I am going to object on behalf of my defendant to any reference on the part of anyone in this case to any court-martial. The court-martial of Radovich I think has nothing to do with the issues involved with my 260
defendants and might well be prejudicial to their defense. It is with great respect I make that statement. That is my belief.

The Court: Your position is quite interesting, and I have to weigh it with respect to the request made by counsel for Radovich.

In view of Mr. Keenan's objection, what have you to say, gentlemen?

Mr. Ansell: Your Honor, I regret to be in the position I am. I do not seem to be able to hear anything.

The Court: I sympathize with you, sir. I have quite much the same difficulty.

Mr. Ansell: I thought your Honor was addressing counsel for Radovich.

The Court: I was. I asked this question: Mr. Keenan, 261
counsel for the Bayers, co-defendants, said he objects to any reference by the Court to any court-martial proceeding against any defendant as he thinks it would be prejudicial to his clients.

Mr. Ansell: I do not know that I am obliged to comment on that, your Honor. It does seem to me that it is inevitable in this trial that reference must be made to the fact that there was a court-martial. Some of the witnesses appearing here will be——

Mr. Keenan: I would state to your Honor, if I may be permitted, that in the event that were it found to be essential to the protection of the legitimate interests of the defendant Radovich, we would ask for a severance so that our clients could be tried separately where they would not be subjected to that disadvantage with the jury. In the event that any such ruling is made I would most respectfully make that motion for a severance at that time because of this request of counsel, which I am bound to say, I must recognize as having merit from the standpoint of Radovich and his counsel, but which from our own viewpoint it seems to me would be mischievous and would be sub-
263 versive to a just determination in the minds of the jury and would be prejudicial to us, the defendants Bayer.

Mr. Ansell: This has taken something of an unexpected turn to us, your Honor, as things frequently do in the course of a trial, but we have no objection to any severance that might take place.

The Court: Do I correctly assume that the Government opposes a severance?

Mr. McGohey: Yes, your Honor, the Government does oppose a severance.

The Court: I don't know specifically whether a motion has been made for a severance, but——

Mr. Keenan: I am making that, your Honor, at this time in view of the situation that has arisen by virtue of the request for certain inquiries made of the jury which,
264 if made, I believe would be prejudicial to the rights of the defendants Bayer in this case.

The Court: So far it is only a request which I have not complied with, and at this time certainly I will overrule a motion for a severance.

Mr. Keenan: May I ask your Honor if I may have an exception to that ruling, and it may be renewed at a later period of time?

The Court: Yes.

I think I am going to do it this way, gentlemen. I shall not tell the jury on their interrogation on the voir dire that there has been any proceeding by court-martial or any other proceeding, but I think I shall ask them that if it should appear that there has been any other legal proceeding concerning any defendant would they be influenced by such other legal action. At the same time I shall tell them that it should not. Now, if after I have said what I am going to say you have further motions, I will of course entertain them.

Is the jury ready?

Mr. Keenan: Your Honor, before the jury is called in and in the interest of saving time, I would like to object 266
to the introduction of any evidence and to ask this cause be dismissed on the ground that in view of the statement that this indictment does not consist or comprise the offense of conspiring to accept a bribe, we believe, the defendants Bayer, that a cause of action is not stated, that the indictment is invalid and therefore, at least for the protection of the record, we would like to urge at this time that the taking of evidence be not—there be no further proceeding and the indictment be dismissed because it does not state an offense.

The Court: All right. Motions will be overruled.

Mr. Keenan: To which we have an exception?

The Court: Yes, you have an exception.

Now, give me just a little bit more information——

Mr. Ansell: If your Honor please, I have conferred with 267
my associate here and we are perfectly satisfied with your Honor's thought, the first thought, that you would ask the jurors on the voir dire with respect to the court-martial, omitting, however, all reference to the conviction. Your second thought, your Honor, we think is too narrow and we ask your Honor to revert to the first thought and if he feels that he ought not to do so that he give us an exception to that. Whatever the practice may be here, your

Honor, I don't know, but we think that that question ought to be asked by your Honor, I mean the first question, omitting the conviction.

The Court: I hardly see how you can except to what I have said until I have said it.

Mr. Ansell: That is probably true.

The Court: If when I have interrogated the jury you then wish to except, I will grant you an exception.

Mr. Ansell: Yes.

The Court: But I would like for you to state now specifically what you do wish me to ask the jurors with reference to the court-martial.

269 Mr. Ansell: If the reporter could read back what your Honor said and what I said——

The Court: I have what I said pretty well in mind. I don't know about what you said.

Mr. Ansell: I said in substance, or I intended to say this——

The Court: If I may interrupt, what I want to know now is specifically what you wish me to ask the jury.

Mr. Ansell: I would like your Honor to ask the jurors if it should appear in the course of this trial that the defendant Radovich had been court-martialled for an offense growing out of the same transaction, out of which this indictment—the same or similar transaction, if that fact would create a prejudice in their minds against Radovich so that they could not fairly try the defendant Radovich
270 in this case on the evidence.

The Court: All right, sir, I think I understand you. Now, if what I say does not satisfy you then I will give you an opportunity to except.

Now will you give me a little information before they come in: Where do the defendants Bayer reside? I don't mean the street address, but I mean so that I can identify them for the jury.

Mr. Keenan: They live in Lawrence, I believe, Long Island.

The Court: Both of them?

Mr. Keenan: Samuel Bayer lives in Lawrence, Long Island, and Elias Bayer lives in New York City, on 86th Street.

The Court: West 86th Street, New York. Where is the residence of the defendant Radovich?

Mr. Ansell: Radovich's home is in California, Los Angeles. As your Honor knows, a man acquires no domicile in the Army. He is now stationed for duty or temporary duty at Andrews Field, some 10 or 12 miles outside of Washington, and I think near Marlboro, Maryland. 272

The Court: All right, sir, thank you.

All right, let them come in.

(Oct. 3, 1945.)

(The entire panel of jurors was sworn.)

(Twelve jurors placed in the box.)

The Court: The case which you are now—some of you will be—called upon to try is the case of the United States against Samuel Bayer, Elias Bayer and Walter V. Radovich.

Samuel Bayer resides at Lawrence, Long Island; Elias Bayer at West 86th Street, New York City, and the defendant Radovich has his home in Los Angeles, California. He is presently in the United States Army, a Major in the United States Army, and stationed at Andrews Field, 273 near Washington.

Counsel in the case for the Government are Mr. John F. X. McGohey, Mr. Edward C. Wallace, Mr. Samuel Rudykoff; for the defendant Samuel and Elias Bayer, Mr. Joseph B. Keenan and Mr. Washington I. Levy, and for the defendant Radovich, General Samuel T. Ansell and Mr. Richard Robb.

Are any of you in any way by blood or marriage related or connected to any of those persons, defendants or counsel? (No response.)

Have any of you any relations in the office of the United States Attorney here in New York? I take it that none of you are employed by the United States Government. All right.

Now the offense which is here charged and which you will be called upon to try is that of conspiracy, that is, the Government charges that these three defendants conspired to defraud the United States of the honest and conscientious service of an officer of the United States, the defend-
275 ant Radovich.

Now, has any of you formed or expressed an opinion as to the guilt or innocence of any of these defendants as to the offense charged? Do any of you know any reason whatsoever which would prevent your giving the Government and these defendants a fair trial on this charge?

Now I shall tell you very briefly—in more detail later—that it is your sworn duty to try and determine this case upon the evidence and the law which you hear in this courtroom. It is possible, however, that during the course of this trial you may hear some reference to some other legal proceeding involving the defendant Radovich, growing out of some of the transactions about which you will hear evidence. Now can you fairly give this defendant Radovich and all the defendants a fair and impartial trial, irrespec-
276 tive and disregarding anything which you may hear about any other legal proceedings elsewhere? Do any of you feel any doubt about that?

Are there any further questions, gentlemen? (To clerk:) All right, hand the list to counsel.

I think at this point I would like to have counsel come up to the bench.

(The following proceedings were had at the bench, out of the hearing of the jury.)

The Court: I think probably, gentlemen, if there is to be an exception to what I have said, I should hear and consider it now, before I require you to exercise your challenges. Have you anything to say, Mr. Keenan?

Mr. Keenan: No, I haven't any exception.

The Court: Have you?

Mr. Ansell: I think not. I wonder if you would object to asking the jury whether they have read anything about this case in the papers—we would like to know—or who have not, for the purpose of exercising a peremptory objection.

Mr. Robb: Or any magazines.

The Court: I have no objection to asking that. 278

Mr. Keenan: At any time.

Mr. Wallace: Shouldn't it be, have they formed any opinion as a result?

The Court: That may follow.

Mr. Keenan: But I have no exception.

(The following took place before the jury:)

The Court: It has been suggested, ladies and gentlemen, that I ask you one further question. Have any of you, so far as you presently can recall, read anything in the newspapers or magazines or weeklies, news weeklies, with reference to this case?

(Two jurors so indicate.)

The Court: You two gentlemen have. Well, let me ask you further, has what you have read, created any impression in your mind as to the guilt or innocence of any of 279 these defendants which would make it improper for you to undertake to give a fair and impartial trial?

Do you feel that any impression has been created on you, or that you could give a fair and impartial trial? All right, sir.

A Juror: I also have read—just the headlines, because I am not interested in those things in the paper; so, I mean, I know something about it but it hasn't made any impression on me at all because I never read those.

The Court: Your answer would be the same then.

The Juror: I never read any through.

The Court: All right, sir. By the way, I have omitted something, gentlemen, and that is the question of whether or not we should have alternate jurors.

Mr. McGohey: I think we should.

The Court: I believe that comes up with selecting the jury.

Mr. McGohey: After you select the first twelve, yes, sir.

The Court: It certainly could do no harm.

(Jurors 6 and 7 excused by the defendants.)

(Two new talesmen were seated in the box.)

281 The Court: Now, sir and madam, you paid careful attention, no doubt to the questions which I asked the other jurors who were in the box. Would the answers which you give to those questions be in any way different from the answers the other gentlemen made? Have you read in the newspapers or news weeklies any reference to this trial? Have you, sir?

A Juror: I don't think so, sir.

(Juror No. 6 excused by the Government and replaced by a new talesman.)

The Court: You have no doubt paid close attention to the questions?

The Juror: Yes, sir.

The Court: Would the answers which you would make to the questions which I have propounded be in any way
282 different from the answers of the other jurors in the box? Have you read any accounts relating to this charge in the newspapers or magazines?

The Juror: No, sir.

The Court: All right.

Mr. McGohey: My associate, Mr. Wallace, I think, has previously in one of his trials here had as a juror one of the jurors who has recently been selected. I think that is

juror No. 7. And I am sure that Mrs. Sloan was answering accurately when she said she did not know anybody.

The Court: I did not ask her that. I asked if she were in any wise related or connected with anyone.

Mr. McGohey: I thought you had asked whether she knew, whether the jurors knew any of us, your Honor.

The Court: I haven't asked that.

Mr. McGohey: I wanted to make that disclosure on behalf of the Government, your Honor.

The Court: Would that fact in any way influence your decision in this case?

Very properly, that would be announced in court.

Mr. McGohey: Yes. The Government makes no objection to the lady, but I just wanted to make that disclosure. 284

The Court: I understand.

(Jurors 1 and 12 excused by the defendants, and were replaced by new talesmen.)

The Court: You have heard the questions and answers which have previously been asked and given. Would your answers to the questions which I have asked be in any way different from the answers of the other jurors?

Juror No. 1: Well, I have a son in the F.B.I.

The Court: You have a son in the F.B.I.?

Juror No. 1: Yes, sir.

Juror No. 12: I have read about this matter quite a bit, and I have a very definite opinion on it.

The Court: You have an opinion, have you, which would require evidence to remove? 285

Juror No. 12: Well, very considerable.

The Court: I didn't hear that.

Juror No. 12: Very considerable.

The Court: I think I had better excuse you. The Court will excuse you.

Now you say, madam, that you have a—what is the relative?

Juror No. 1: He is a special agent with the Federal Bureau of Investigation.

The Court: Is he your brother?

Juror No. 1: My son.

The Court: Would that fact influence you in your determination of this case?

Juror No. 1: No, I don't think it would.

The Court: Would it incline you at all to give more credence to the evidence offered by the Government?

Juror No. 1: Wel, I don't know. I think I would rather be excused.

The Court: She said she would rather be excused. Do you feel that your relationship—your son—would incline
287 you to give more credence to what the Government witnesses say?

Juror No. 1: I think it would.

The Court: I think I will excuse you. Call two more.

(Jurors 1 and 12 excused and replaced by two new talesmen.)

The Court: Now, gentlemen, you have listened carefully to what has taken place, I assume. Would your answers to the questions which I have propounded be different in any way from the answers of the jurors who were in the box? And you, sir, have either of you read anything in the newspapers or news magazines about this occurrence? Have you, sir?

A Juror: Not as I remember, your Honor.

288 The Court: All right. Hand the list to counsel.

(Juror No. 10 excused by the Government and replaced by a new talesman.)

The Court: Madam, as to the questions which I have propounded, would your answers be different from those of the jurors who were in the jurybox? Have you read anything about this? All right.

(Jurors 2 and 9 excused by the defendants and replaced by new talesmen.)

The Court: Ladies, you have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have either of you read anything in the newspapers or magazines about this occurrence? All right.

(Juror No. 8 excused by the Government and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? 290

A Juror: I heard mention of it yesterday.

The Court: Would what you have read cause you to have any conviction as to the guilt or innocence of these defendants?

The Juror: No, sir.

The Court: All right.

(Jurors Nos. 5 and 8 excused by the defendants and replaced by new talesmen.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? All right. 291

(Juror No. 10 excused by the Government and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors have given. Would your answers to such questions be in any way different from the answers of those ladies and gentlemen in the jury box?

Have you read anything in the newspapers or news magazines about this occurrence? All right.

(Juror No. 4 excused by the defendants and replaced by a new talesman.)

The Court: You have heard the questions which I have asked and the answers which the jurors in the box have given. Would your answers to those questions be in any way different from the answers of those ladies and gentlemen in the jurybox? Have you read anything in the newspapers or news magazines about this occurrence? All right.

(A juror excused by the Government and replaced by a new talesman.)

293 Mr. McGohey: That completes the Government's challenges. It completes both sides now.

The Court: Do I understand correctly, gentlemen, this is the jury?

Mr. McGohey: That is correct, your Honor.

The Court: Though as to the matter of alternate jurors, we have exhausted our panel, I still think it probably would be worth while to take the time to impanel all the jury even though I have to interrogate them.

Mr. McGohey: Yes, I agree with that, your Honor.

The Court: All right. (To clerk:) Get some up.

Mr. McGohey: I suggest, your Honor, that your Honor hasn't asked this witness about possible prejudice.

The Court: I beg your pardon. I overlooked it. As to the questions I have asked the other jurors, and the an-
294 swers which they have given, would your answers to those questions be any different?

The Witness: No, they would be the same.

The Court: Have you read anything about the——

The Juror: No, sir.

The Court: All right, sir.

(Conference at bench between court and counsel.)

The Court: Now I shall tell you very briefly—in more detail later—that it is your sworn duty to try and deter-

mine this case on the evidence and the law which you hear here in this courtroom. It is possible, however, that during the course of this trial you may hear some reference to some other legal proceeding involving the defendant Radovich growing out of some of the same transactions about which you will hear evidence here. Now, can you fairly give this defendant Radovich and all the defendants a fair and impartial trial, irrespective and disregarding anything which you may hear about any other legal proceedings elsewhere?

The Juror: Yes, sir.

The Court: Do you feel any doubt about that at all?

The Juror: No, sir. 296

The Court: Have you read anything about this case?

The Juror: No, sir.

The Court: All right, sir. Now that completes the jury panel. On the matter of alternates, call two alternates.

(The jury was duly sworn.)

(Two alternate jurors were placed in the box.)

Mr. McGohey: I would like to know, if your Honor please, whether the defendants consider the alternate satisfactory or whether we are going to have——

The Court: You are entitled to two challenges.

Mr. McGohey: Two for the defense and one for the Government.

The Court: Do you care to exercise your challenge?

Mr. Keenan: We are satisfied with the jury as it is now, your Honor. 297

Mr. Robb: Defendant Radovich is also satisfied.

Mr. McGohey: The Government is satisfied, your Honor.

The Court: All right. Are you ready to proceed? Have the defendants pleaded?

The Clerk: Yes.

The Court: All defendants have been arraigned and pleaded, and are here?

The Clerk: Yes.

Mr. McGohey: I suggest, your Honor, that we might take a recess and let the jury go to the jury room.

The Court: First, lest I forget it, we have not sworn the alternate jurors.

(Two alternate jurors sworn.)

The Court: Ladies and gentlemen, you are about to try this case now, and I want to charge you and admonish you to bear it in mind; do not discuss the case now nor undertake to discuss it during the trial. You should hear all the evidence and the charge of the Court upon the law applicable to the case before you undertake to decide it. So do not discuss it and undertake to arrive at any conclusion
299 until you have heard it all. Then, more particularly, do not discuss it nor permit anyone else to discuss it with you during the course of the trial. Then the matter of newspapers. I do not know whether there will be any mention of this case in the newspapers or not, but if there is, I charge you not to read the accounts. You should not read the newspaper accounts of this trial, if there are any. I do not know whether there will be any or not, but if there are any such, then I will charge you not to read them, and if you should inadvertently see a headline or begin to read, I charge you particularly that you should disregard anything you see in a newspaper or in any other publication or which anyone might inadvertently tell you about. It is your sworn duty to try this case upon the evidence which you hear in this room, and the law as I shall give it to you
300 after you have heard the evidence. I go into this detail now so that you may bear it in mind whenever we adjourn from day to day or hour to hour.

The court will now take a ten-minute recess.

(Short recess.)

The Court: Are you ready, sir?

Mr. McGohey: May it please the Court, I should like to ask at this time the Court to direct that all witnesses be excluded from the courtroom.

The Court: All right.

Mr. McGohey: Pardon me, your Honor. With respect to that, there is an agent of the Federal Bureau of Investigation who was in charge of this investigation.

The Court: You are entitled to one person.

Mr. McGohey: And I would like to have him here with me. Mr. Flynn.

The Court: All right. Call him.

Mr. Robb: We expect that we may have to call Mr. Wallace as a witness.

The Court: Who?

Mr. Robb: Mr. Wallace, the Assistant United States Attorney, as a witness. 302

The Court: Do you wish to exclude him?

Mr. Robb: I think if we are going to have one person, he ought to have either Mr. Wallace or Mr. Flynn.

The Court: No, I don't think so. I think he is entitled to one Government representative in addition to counsel. Mr. Wallace is of counsel, is he not?

Mr. Robb: Yes, but I would like to have it understood that we do expect to call Mr. Wallace.

The Court: You may call him if you wish, but I am not going to exclude him. Who is the person you wish?

Mr. McGohey: Mr. Flynn.

The Court: All right. All other persons who are witnesses in the case will please retire. Mr. Clerk, show them where they may go.

Mr. Ansell: May we approach the bench? 303

The Court: Yes, sir.

(Conference at the bench between Court and counsel.)

October 3, 1945.

THE GOVERNMENT'S OPENING.

Mr. McGohey: May it please the Court, General Ansell, Mr. Keenan, Mr. Cohen, Mr. Levy, Mr. Foreman, Ladies and Gentlemen of the Jury:

Now on behalf of the Government I am about to outline to you what this case is about, and what the Government charges the defendants have done in connection with this indictment.

Before I say anything at all, either about the indictment or about any of the facts in the case, I would like strongly
305 and as seriously as I can to impress upon you one thing. Nothing that I say to you in this opening is evidence; it proves nothing. The evidence in this case will come to you from the witnesses on the stand here and from such documents as are permitted in evidence and disclosed to you. That will be the evidence. So the mere fact that I say anything to you, I don't want you to feel that that is testimony. And, by the same token, when the defendants' attorneys address you, if they do, the same rule will apply.

Mr. Keenan: I object to the jury being lectured by the United States Attorney. I think that is for the Court.

The Court: Objection overruled, sir.

Mr. Keenan: Exception.

The Court: Go ahead.

Mr. McGohey: Nothing that I say to you I want you
306 to take in the form of evidence. Now, likewise, this case starts with an indictment voted by the grand jury of this court. This indictment charges that the three defendants in this case, Samuel Bayer, Elias Bayer and Walter Radovich, conspired to defraud the Government of the United States out of its right to the conscientious service of Walter Radovich as an officer of the United States Army.

Now that charge is not evidence; it is merely a charge which the Government will have to prove beyond a reasonable doubt, beyond your reasonable doubt.

The indictment charges, as I said, that the conspiracy was to deprive the Government out of its right to the faithful, conscientious, disinterested and unbiased services and judgment of officers of the United States Army, and, particularly, the service and judgment of Walter Radovich, free from corruption, partiality, improper influence, bias, dishonesty, and fraud.

The indictment further charges that it was a part of the conspiracy that the defendants Samuel Bayer and Elias Bayer would make the acquaintances of various officers 308
of the United States Army, stationed at various Army posts, including the Army post at Mitchel Field, in Long Island, and other fields which are mentioned in the indictment.

And it charges that the defendants Samuel and Elias Bayer would, during the period of the indictment, make gifts of money and other valuable things to these officers, and particularly to the defendant Radovich. And the indictment further charges that it was a part of the conspiracy that during its continuance the two Bayers, Samuel and Elias, would give sums of money aggregating approximately $7,000, to the defendant Radovich, then an officer of the United States Army, with the intent to influence the action of the said Walter V. Radovich and to induce him in violation of his lawful duty, to transfer 309
two privates in the United States Army, one Martin Bayer, who was the son of Samuel Bayer, and the nephew of Elias Bayer, and another soldier named Melvin Usdan, who was the nephew of Samuel Bayer; transfer them from and to various units in the United States Army for the purpose and in order that these two soldiers, Martin Bayer and Melvin Usdan, might not be attached to a unit

of the United States Army which was about to be sent out of the continental United States for service overseas.

And it is further charged as a part of the conspiracy that the defendants would conceal their various transactions and that they would cause the destruction and the alteration of various books and records which contained evidence of their transactions, the changes and the obliterations and the destruction being done for the purpose of hiding these various transactions. That is substantially what the charge is.

Now the Government will prove that some time in the early part of the year 1943, the defendant Elias Bayer
311 made the acquaintance of an officer named Colonel Vidal, who was then stationed at Mitchel Field, and other officers. That Colonel Vidal and another officer by the name of Roeser he first met at the Cocacabana night club here in New York, that he had conversations with them that evening and learned that they were stationed at Mitchel Field, where the two soldiers Martin Bayer and Melvin Usdan were then stationed, and at the same time he informed these two officers that he was in the textile business and that he might be in a position to assist them in securing uniforms at cost, or at less than the retail price. And thereafter this acquaintance ripened into a friendship, perhaps not a friendship, a deep friendship, but an acquaintance or a friendship that was just more than a casual thing; they saw each other frequently from time to time; and these
312 officers and other officers at Mitchel Field who thereafter became acquainted with Elias Bayer were entertained from time to time by Elias Bayer at night clubs, at theatres, and sporting events of various kinds. And then after Elias had made these acquaintances he introduced at least some of these officers to his brother Samuel Bayer, and among the officers whom he introduced to his brother Samuel was the defendant Walter Radovich, now a Major in the United States Air Corps, and at that time a Captain.

Captain Radovich at the time was in command of the Headquarters Squadron of the First Fighter Command at Mitchel Field. And the two boys, the two young soldiers, Martin Bayer and Melvin Usdan, were then serving as clerks in the office of the Headquarters at Mitchel Field, that is, Base Headquarters. That was a different headquarters from the headquarters to which Major Radovich was attached.

Now in addition to these officers, the defendant Samuel Bayer also became acquainted with another officer in the United States Army, a medical officer, a Major Morris H. Saffron. He had made Major Saffron's acquaintance some time in 1942 or early 1943, through an introduction from 314
another relative of Sam Bayer's, a man by the name of Busch, one of three brothers who conduct a uniform company known as the I. Buss Uniform Company.

Now shortly after the Bayers, Elias and Samuel, became acquainted with these various officers at Mitchel Field, including Major Radovich, arrangements were made through the intercession of the Bayers with Major Radovich and other of the officers to have these two boys, Martin Bayer and Melvin Usdan, transferred from the headquarters of the base to the headquarters of the First Fighter Command, the headquarters squadron of which Major Radovich was the commander, and that transfer was effected, and so the boys came to the very organization of which Major Radovich was the commanding officer.

And then some time in the summer of 1943, the boys 315
being in the headquarters of the First Fighter Command, the defendant Samuel Bayer wanted to have his son and his nephew, Martin Bayer and Melvin Usdan, transferred out of this First Fighter Command and into the medical detachment at the base hospital at Mitchel Field, and he spoke to Major Radovich about that and Major Radovich agreed to make—to approve the request for the transfer if the boys made the request, or if a request was made

for their transfer, whether it came from the boys or anybody else. And the request was made for their transfer to the medical hospital, but it didn't go through right away, but after it had been made and before it had gone through, Samuel Bayer and Elias Bayer came down to Mitchel Field and they talked to a couple of officers there and asked them why wasn't it going through, and they came back a second time to find out why it wasn't going through. And the reason they were very anxious to have it go through was that they had promised Major Radovich that if he effected the transfer of the boys out of the Fighter Command into the medical detachment, Sam Bayer
317 had promised that he would pay him $2500. Well, eventually the transfer went through. And thereafter on three different occasions Samuel Bayer did make payments in cash to Major Radovich. He paid him cash; at one time in a taxicab, at another time in a car in front—not in a car but in the lobby I think it was of Radio City or along in front of one of the buildings in front of Radio City, and then a third time he made a payment of cash to him in the lobby of the St. Moritz Hotel, and the total of those payments in cash aggregated $1950 which Samuel Bayer paid in cash to Major Radovich for the purpose of effecting the transfer of these boys from the First Fighter Command Headquarters to the medical detachment at Mitchel Field.

Now I said to you that Sam Bayer, from the time that
318 the transfer was first proposed, between that time and the time that it actually went through, he came down to call on officers at Mitchel Field to ask their assistance in getting that through or to find out why it hadn't gone through; and the testimony will show that Sam Bayer urged at that time and pleaded at that time to have that order go through, because, as he said, he didn't want his boys to be out in any outfit which would be operating outside of the continental United States; he wanted them kept

here in this country and he wanted them if possible kept right at that hospital at Mitchel Field. Well, the transfer did go through, but a very few days after, as a matter of fact about five days after, orders were issued transferring these boys out of the hospital unit at Mitchel Field, and transferring them to units of airborne engineers; one boy was transferred to Westover Field in Massachusetts and the other boy was transferred to Bradley Field, in Connecticut, both units of the airborne engineers.

Now as soon as that happened, the defendant Samuel Bayer immediately began to call up all of the officers whom he could contact at Mitchel Field and to plead with them please to get his boys out of these outfits which were 320
going overseas and which, in his opinion—any outfit which in his opinion were very dangerous, and he wanted to get them out of there just as soon as he could. He spoke to various officers about that, and the officers whom he spoke to both personally and in conversations, in telephone conversations, will testify to those conversations right from this stand. And one of the men he spoke to was Major Radovich, a co-defendant in this case, Radovich, the man to whom he had previously paid $1950 to effect the transfer of the boys from the First Fighter Command into the medical unit. As a matter of fact, one of the very first he got in touch with was Radovich, and wanted to find out what happened, what fell through, why are the boys being changed, "I thought they were in the medical department, now they are being shipped out to the engineers. 321
Why?"

The various officers that he contacted told him that in their opinion there wasn't anything that could be done about it, the boys were transferred from the field into these units; the thing for Sam to do was to let them alone. But he pleaded with Radovich and continued to plead with Radovich—"isn't there something you can do to get my boys out of this airborne engineers? They are going to be flying, they

are going to be paratroopers, they are going to be in great danger. I want them out of there." Radovich told them there wasn't anything he could do about it, to leave them alone. But he continued to plead with Radovich to get them out, and finally he offered Radovich $5,000 for each boy whose transfer he would effect out of the airborne engineers into some outfit that would be safe, some outfit that wasn't going to go overseas.

Now bear in mind that at all times during the conspiracy, and at all times during the period which I am discussing with you, these young men were classified as clerks, they were clerks in the base headquarters, they were
323 clerks when they were with the First Fighter Command, they were clerks when they were in the medical detachment at the hospital, they were medical clerks when they were transferred to the airborne engineers. At no time were they combat soldiers in the sense that they had to fight with guns. They were clerical men and so classified, and the orders, the United States Army orders, transferring them from place to place, will clearly show that classification.

Well, the offer was made to Radovich. Now in the meantime Radovich had become associated—he had left the First Fighter Command at Mitchel Field and he had become a member of a group working with Colonel Philip Cochran in organizing what subsequently became the First Air Com-
324 mando Unit, a unit that subsequently went to Burma. That Air Commando Unit was something to which Cochran had been assigned to organize specially. He was given a free hand in picking personnel for that unit. He was given by the War Department and by the Commanding Officer of the Air Forces the highest priority for the selection of personnel, so high that the ordinary channels of transferring either enlisted personnel or commissioned personnel in the Army were cut short, they were streamlined and simplified, so that if Colonel Cochran or anybody

authorized by him wished to have a man transferred from any unit in the United States to the Air Commando Group, all that officer had to do was to contact a certain office in Washington, give the name of the man he wanted transferred, his serial number and so on, and the place of his location, and immediately telegraphic instructions would be issued out of Washington to the Commanding Officer of the man who was wanted to be transferred, and forthwith orders would be issued by the local commander, immediately transferring that man out of his unit and over to the First Air Commando Group.

Now, of course, at that time, in the fall of 1943, the organization of this First Commando Group was a secret of 326
the highest order. As a matter of fact, the Air Commando Group was not so designated; it was designated in the Army records as Project CA, and then some number which we will get in the course of the evidence. But that is how they regarded it. And they had this special arrangement set up in the Army Air Forces so that, immediately, personnel could be gotten into that outfit.

Now, after the pleading by Sam Bayer and the offer of the payments of the $5,000 for each boy, Radovich consulted with an officer at Mitchel Field familiar with personnel matters, to inquire whether or not, first, this officer thought it would be possible to effect the transfer of Martin Bayer and Melvin Usdan out of the airborne engineers, and into some other outfit, and the officer advised Bayer 327
that he did not believe that could be done because the airborne engineers, being an alerted outfit, destined shortly to go overseas, you couldn't transfer a man out of that kind of organization into an organization that was destined to stay at home, because in 1943 most of the troops were being processed for overseas service. And then later Radovich asked him whether or not he thought a transfer from the airborne engineers to the air commando group would be approved, and he was informed that that prob-

ably would be approved, because of this very high priority which the Government had placed on the air commando group. And then Radovich said, "Well, if I get them into the air commando group and we are overstaffed, we don't need them, could I get them into something else, could I get them into, for instance, the Air Transport Command?" And this fellow said, well, he thought probably they could. But the immediate thing was to get them out of Westover Field and Bradley Field, the airborne engineers.

So then Radovich, exercising this power that he had, or his authority that he had to get men transferred, went to Washington, and he went to the clerk that had the
329 charge of issuing these special orders, and he asked that clerk to issue orders for Martin Bayer and Melvin Usdan, then stationed with the airborne engineers, transferring them from the airborne engineers to the First Air Commando Group at Goldsboro, North Carolina, and immediately—the record will show it—that very same day the orders were issued, and the men were transferred to the Air Commando Group.

Now the Air Commando Group was organized on a basis of pure voluntary enlistment. A man could apply to become a member of the Air Commandos, he might be accepted or he might not. If he asked to come in and was received, and after he found out the character of the mission he asked to be relieved of his assignment there, he was allowed to go back to his organization immediately. In
330 other words, nobody was wanted in that group who did not want to be there, and, furthermore, nobody was wanted in that group who, in the opinion of the commander and his associates, was not the type of man who would be able to stand the kind of work that that group was going to do.

Now when Bayer and Usdan, the two privates, arrived at Goldsboro, they reported to an officer there named Colonel Boebel. Colonel Boebel had known those two men from Mitchel Field because he had been at Mitchel Field.

As a matter of fact the base headquarters where these boys had been originally. And he recognized them and asked them what they were doing there, and they told him that Major Radovich had arranged their transfer. And then, later on, these boys were assigned to quarters, and shortly thereafter Colonel Boebel saw Major Radovich and he said to him, "I see those two boys Bayer and Usdan are here." And Radovich said to him, "Well, that is all right, don't be concerned about it, they are going to be out of here very shortly. I am going to have them transferred out of here." And the records will show that two days after they arrived at the Air Commando Group, within two days Radovich by telephone from Goldsboro, again communicated with 332
this clerk in the office of the Air Force Commander in Washington, and requested that she then issue orders transferring the two boys, Martin Bayer and Melvin Usdan, out of the Air Commando Group and to a field at Wilmington, Delaware, where they would then be in the air transport service.

Those orders were issued and the boys were changed to Wilmington, Delaware.

Now you will remember that I stated that Samuel Bayer had offered and agreed to pay Major Radovich $5,000 if Radovich would effect the transfer of these two boys, that is, $5,000 for each boy, a total of $10,000.

After it was all arranged, Radovich communicated to Sam Bayer that the deal was set, the orders were through, and that his part of the bargain had been completed. And 333
then Samuel Bayer sent his brother Elias Bayer and another relative down to Goldsboro, North Carolina, and he gave them $5,000 in cash which was in an envelope, and they arranged with Radovich to meet at the railroad station in Goldsboro on a certain night, some time around midnight, when the train from New York would get down there, and when the train arrived these two men got off. Radovich came around the back of the station. Elias Bayer,

who had seen him many times, recognized him, and he handed him the envelope with the $5,000 and, in addition, he handed him three bottles of whiskey, but before he did he asked him "Are you sure everything is all right?" and when Radovich assured him that it was, he gave him the envelope with the $5,000 and he gave him the three bottles of whiskey, and Radovich went off in his car, and then Elias Bayer and his companion went off somewhere else.

That, ladies and gentlemen, is the outline of what the Government intends to prove in this case. Again I ask you not to take my word for anything I have said here, not to take anything that I have said as evidence, but please
335 keep your minds fully open, hear the witnesses and take the evidence from the witnesses. Thank you very much.

October 3, 1945, P. M.

AFTERNOON SESSION.

The Court: Before we start, gentlemen of counsel and ladies and gentlemen of the jury, there is a slight delay in convening here after lunch. It has been suggested to me that I ought to give just a little longer recess for lunch on account of the difficulty of getting lunch down in this section, which I think I shall do. But I want to make the very definite request not only of the members of the jury but of counsel and all interested parties, be on time for all
336 sessions of the court. If any one of us is late, that delays and prevents the functioning of the court for the time. I shall certainly endeavor to be on time and expect everyone else to be. All right, you may proceed.

Mr. McGohey: I propose now to offer some certified copies of official records of the War Department, certified under the seal of the War Department, and perhaps we could save time if I could submit them to counsel for the defendants.

The Court: All right.

Mr. McGohey: If your Honor please, I offer in evidence this certified copy, certified under the seal of the War Department of the United States, of the oath taken by the defendant Walter V. Radovich as a Second Lieutenant in the Air Corps.

The Court: Is there objection, gentlemen?

(No response.)

(Marked Government's Exhibit 1.)

Mr. McGohey: May I read that at this time to the jury?

The Court: So much as you think is material.

Mr. McGohey: Yes. (Reads Government's Exhibit 1.) 338

ROBERT B. TRAVIS, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Colonel Travis, you are an officer of the United States Army, are you not? A. That is right, sir.

Q. And your rank is Lieutenant Colonel? A. That is right, sir.

Q. To what branch of the service are you assigned? A. To the air corps.

Q. What is your present duty? A. I am the Adjutant General in the A1, personnel officer, Headquarters of the First Fighter Command, Mitchel Field. 339

Q. Will you keep your voice up so that the last juror in the box can hear you. In your duty as adjutant, is it part of your duties to be in charge of records of your command? A. That is one of my responsibilities, yes, sir.

Q. I show you this paper and ask you if that is a paper kept in the regular course of business in your office in your command? A. It is, sir.

Q. In your charge? A. That is right.

Mr. McGohey: I offer so much of this paper as is enclosed in paragraph 2 and paragraph 4 on this page headed "Special Order No. 231", dated August 19, 1943.

The Court: Any objection?

Mr. Keenan: I don't know what it is.

Mr. McGohey: I think it has not yet been shown, your Honor. I am offering it in evidence.

341 Mr. Keenan: You are offering what in evidence?

Mr. McGohey: I am offering paragraphs 2 and 4 of that order.

Mr. Keenan: We object to it, your Honor.

The Court: On what ground?

Mr. Keenan: On the ground that it has not been shown to be material to any——

The Court: I treat your objection as a motion to strike out, subject to its materiality, and admit the document. Received.

Mr. Keenan: Your Honor, may I at this time make objection to a method of proceeding generally with proof in this case of a conspiracy by introducing evidence that has no materiality with reference to any

342 evidence offered at the moment. I say that to your Honor because of an unfortunate experience I have had with the succession of bits of evidence being offered and being connected up at another time. That has received some comment from the Circuit Court of Appeals recently.

The Court: Would you expect it to be all offered simultaneously?

Mr. Keenan: I would expect it to be offered when its materiality is admissible.

The Court: Objection overruled.
Mr. Keenan: Exception.
The Court: Proceed.

(Paragraphs 2 and 4 received in evidence as Government's Exhibit 2.)

Mr. McGohey: If your Honor please, may I read from the exhibit?
The Court: Yes.
Mr. McGohey: This paper which has just been introduced is headed "Special Order No. 231", and then "Restricted", and then "Extract", and then over here, "Headquarters First Fighter Command, Mitchel Field, New York, 19 August 1943." 344
Mr. Keenan: What is the date, please?
Mr. McGohey: 19 August, 1943.
Paragraph 2 reads: "Reld. Fr."

Q. Colonel, can you tell us, does that "Reld. Fr." mean "relieved from"? A. Relieved from, that is correct.
Q. This last paragraph is "Transferred to"? A. Transferred to.

Mr. McGohey: Under the heading, "Name, grade, serial number," is the name Melvin Usdan, private, and then in parenthesis the numeral 501, and then down below that the numeral 12219208.

345

Q. Can you tell us, Colonel, what the number 501 in parenthesis on that order means? A. That is a code number for the man's military occupational specialty. Each man has one of those, and that number 501 indicates that that soldier was a clerk, administrative or general, or technical; that he is a clerk.
Q. Will you keep your voice up, please. A. I will endeavor to.

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Q. Under the heading "Relieved from" is this: "HQ and HQ SDN." Does that mean Headquarters and Headquarters Squadron, Colonel? A. That is right.

Mr. McGohey: Then following, "First Fighter Command, Mitchel Field, New York," under "Transferred to" appears "Det. Medical Department, Army Air Base, Mitchel Field, New York." Then in parenthesis it has "Auth:" I assume that means "authority", does it, Colonel? A. That is correct.

Mr. McGohey: The authority: 12th endorsement, 201-Usdan, Melvin (Enl.).

347 Q. I assume that stands for enlisted man. A. "Enl." stands for enlisted man.

Q. In parenthesis. "Hq. AF, EDC & First AF." What does that stand for? A. That is Headquarters Air Forces, Eastern Defense Command and First Air Force.

Q. 17——

Mr. Keenan: Just a moment. I would like to follow that. You are going very fast. He understands them and you do, but I don't.

Mr. Ansell: I would like Mr. McGohey to caution again- -I suppose you will have to keep on cautioning the witness, that is your usual experience, to lift his voice. When I was a cadet in military academy fifty-
348 odd years ago, we had an order "To boom voice", and the Army used to understand that to mean that they were not up to key.

The Court: Go ahead and speak out so these gentlemen can hear you, Colonel.

Q. Just keep your voice up, Colonel, as loud as you can.

Mr. McGohey: If I may continue here: Authority 12th endorsement, 201-Usdan, Melvin, enlisted, Head-

quarters Air Forces, Eastern Defense Command and First Air Force, 17 August 1943, on "ltr"—what does that mean? A. Letter.

Mr. McGohey: Melvin Usdan.

Q. Does that mean a letter of Melvin Usdan? A. A letter originated by Melvin Usdan.

Q. A letter written by him? A. That is right, sir.

Q. 20 July 1943. A. If that date is not in parenthesis, that is the date that he wrote the letter.

Q. "Subject: Request for transfer." A. That is the subject of the letter he wrote.

Q. Now then, Colonel, am I correct in understanding that 350
that legend which I have just read means that the authority for this order of transfer is the twelfth endorsement which appears on a letter of Melvin Usdan, dated July 20, 1943, in which Melvin Usdan requested a transfer from the headquarters and headquarters squadron of the First Fighter Command at Mitchel Field to the medical department of the air base at Mitchel Field? A. That is correct, sir.

Mr. McGohey: Now we also introduced in evidence paragraph 4 of this order which I will read, and I don't mean to go through the various headings, you will understand what they are as I go along. And this is: Martin Bayer, under name, grade and so on, it is Martin Bayer, Pfc. (501) and then that large 351
number 12219010——

Q. That large number in each instance is the enlisted man's Army serial number, is that correct? A. That is correct, sir.

Mr. McGohey: Relieved from: Headquarters and Headquarters Squadron First Fighter Command, Mitchel Field, New York, transferred to the medical

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department Army Air Base, Mitchel Field. And then the legend again, Authority: 12th endorsement 201, Bayer, Martin, enlisted, Headquarters Air Forces, Eastern Defense Command, and First Air Force, 17 August 1943, on letter Martin Bayer, 20 July 1943, subject: Request for transfer.

Q. And that legend means that the authority for that order was the 12th endorsement on the letter of Martin Bayer dated July 20, 1943, in which Martin Bayer requested the transfer? A. That is correct, sir.

353 Mr. Keenan: Your Honor, I will ask to have that last answer stricken out as containing obviously hearsay, because they are now quoting what Martin Bayer did and what he applied for. The best evidence would be his own letter or his own testimony, and unfortunately we can't have that because, as your Honor knows, he is over in the Burma area of the battlefields.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. McGohey: If your Honor please, I offer now a certified copy, certified under the seal of the War Department of the United States, paragraph 32 of Special Order No. 325 of the Headquarters Army Air Base, Westover Field, Massachusetts, dated November 22, 1943.

354 (Marked Government's Exhibit 3.)

Q. Colonel, as part of your duties, are you required to know the various code numbers used by the Army to designate various types of service classifications? A. I am required to know that.

Q. Do you know them? A. Most of them. I don't know them all, sir; there are too many of them.

Q. I show you Government's Exhibit 3, which is paragraph 32 of this paper, and I call your attention to the fact that in front of the name Melvin Usdan, in parenthesis, are the figures 055, and the same figures appear in parenthesis before the name Martin Bayer, and I ask you if you can tell me what that figure 055 stands for? A. That 055 indicates that each of these soldiers was a clerk, non-typist.

Mr. McGohey: May I read the exhibit. This is headed T/5th Gr.——

Q. That stands for Technician, 5th Grade, does it, Colonel? A. That is correct.

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Mr. McGohey: (055) Melvin Usdan, then the serial number, Medical Detachment, 881st AB Engr. Avn Bn.

Q. Do you know what that means? A. Will you repeat that last designation, sir?

Q. Suppose you look at it. A. That is 881st Air Base Engineers Aviation Battalion.

Q. Is that Air Base or Airborne? A. I am not positive, sir; possibly it is airborne.

Mr. McGohey: Then under that Pfc, meaning private, first class (055) Martin Bayer, Serial No., Medical Detachment, 882nd AB Engineering Aviation Battalion, are transferred under present grade to Project No. CA-281, and WP at the proper time——

357

Q. What does that WP mean? A. "Will proceed."

Q. Those are abbreviations? A. Yes, sir.

Mr. McGohey: —the proper time, by rail, from Westover Field, Massachusetts, to Goldsboro, North Carolina, reporting not later than 25 November 1943

to the CO Overseas Replacement Depot No. 3 thereat, for further overseas assignment, semi-tropical climate, on per ch of sta.

The Witness: Permanent change of station.

Mr. McGohey: It being impractical for the Government to furnish cooking facilities for rations, meals for two men for six meals a/r——

Q. That means "at the rate," does it; a/r? A. At the rate of, yes, sir.

Mr. McGohey: At the rate of one dollar per meal will be furnished on meal tickets under the provisions
359 of AR 302215. I assume that AR is Army Regulations?

The Witness: That is correct.

Mr. McGohey: Dependents are not atzd——

Q. I assume that is the abbreviation for "authorized"? A. Yes.

Mr. McGohey: Dependents are not authorized to accompany or join him.

Q. Meaning that the parents or dependents are not authorized to accompany or join these men on this journey? A. That is correct.

360 Q. From Westover Field to go to Goldsboro. The QMC will furnish the necessary T Authority. That is, I assume, traveling authority? A. That is right.

Mr. McGohey: AR 615-200, meaning authority under Army Regulations, 615-200, dated 15 Mar., 1943, and TWX AF PMP 3888 from the CG AAF, Washington, D. C., 22 November, 1943.

Q. Now will you tell us what that means, Colonel, from there "Authority"? A. Authority AR 615-200, 15 March 1943, that date is the publication of the Army Regulation. That particular regulation governs the transfer of all enlisted men. They are transferred under that particular authority. The TWX AF PMP 3888, is from the Headquarters, Army Air Forces, that is, the TWX AF PMP 3888 is the identification of that particular message.

Q. Does the TWX mean telegram? A. The same thing. It is a message transmitted by teletype.

Q. By teletype? A. That is right, sir.

Q. That means a message by teletype from the Commanding General Army Air Forces at Washington on the 362
22nd of November, 1943? A. That is correct, sir.

Q. That was the authority for this transfer? A. Yes, sir.

Mr. McGohey: I offer in evidence certified copy, certified under seal of the War Department of paragraph 38 of Special Order No. 333 from the Headquarters Technical School, Army Air Forces, Technical Training Command, Seymour Johnson Field, North Carolina, dated November 29, 1943.

(Marked Government's Exhibit 4.)

Mr. McGohey: This is headed Special Order No. 333, Headquarters Technical Training School, Army Air Forces, Technical Training Command, Seymour 363
Johnson Field, North Carolina, 29 November, 1943: The following EM——.

Q. That again would mean enlisted men, would it not? A. Yes, sir.

Mr. McGohey: Are relieved from Atchd——.

Q. From being attached, would that mean? A. Yes.

Mr. McGohey: 715th Training Group this station, are transferred at and WP Second Ferrying Group—

Q. What does that "WP" mean? A. "Will proceed."

Mr. McGohey: Will proceed to the Second Ferrying Group, Second Ferrying Division, Air Transport Command, Newcastle Army Air Base, Wilmington, Delaware, and then the following is Del rptg——

Q. What does that abbreviation mean, Colonel? A.
365 Wilmington, Delaware, reporting—rptg.

Mr. McGohey: Then the rptg is reporting to the Commanding Officer thereat for assignment and duty. EM—enlisted men—relieved from assignment to Project CA-281.

The Witness: That is correct, sir.

Mr. McGohey: And then follows the name of the two men. T/5.

Q. That means technician, fifth grade? A. Correct.

Mr. McGohey: (055 Melvin Usdan) and then NMI.

The Witness: That means no middle initial.

Mr. McGohey: And a serial number. And then
366 Pfc, private first class (055, Martin B. Bayer) and then his serial number.

The Witness: Yes, sir.

Mr. McGohey: In accordance with AR; Army Regulations, 30-2215, the Quartermaster will issue two meal tickets to two enlisted men for one-third days each——

The Witness: TC means Transportation Corps.

Mr. McGohey: The Transportation Corps will furnish necessary transportation.

Q. What does TDN mean? A. TDN means transfer directed is necessary in the military service.

Q. What is this? A. Those are procurement authorities to which the cost for everything would be charged, that is, Government charges.

Q. Then follows the authority. A. Yes, sir.

Q. The authority— A. WD is War Department, Headquarters Army Air Forces, Washington, D. C. The 25 November, 1943, the date that letter was written from the Army Air Forces, File AFPMP-2-KRS/mm/nlr—those are the identifying symbols for the office of origin in the Army Air Forces Headquarters. I can't tell you exactly what office that originated from. 368

Mr. Keenan: Can we have the date of that letter?

Mr. McGohey: The letter that has just been referred to, you mean?

Mr. Keenan: Yes.

Mr. Wallace: The 25th of November.

Mr. McGohey: I have no further questions of this witness.

The Court: Any questions?

Cross-examination by Mr. Keenan.

Mr. Keenan: Those were all the regular records of the United States Army? A. Yes, sir. 369

Q. And in proper form? A. Yes, sir.

Q. I noticed that in one, I think it was Government's Exhibit 2, the transfer of Melvin Usdan, there was some statement of twelve endorsements. You remember that? A. Yes, sir.

Q. What would that mean, Colonel? A. To make it clear, I had better explain first how that is handled, sir.

Q. I wish you would. A. The letter originates with an individual with the headquarters or from any source that would put it into the military administrative channels. Instead of a reply to that or any action being taken on that, it being handled in a new letter, each office through which it passes puts an endorsement on it, that is, they write a letter, a specific form used by the Army, and they call that endorsement. Since the letter had twelve endorsements on there, it indicates it was originated with the individual and passed through twelve offices in which it went to the First Fighter Command with a direction that transfer be effected, and each of those endorsements is tantamount
371 to a new letter. That is a form of correspondence that the Army uses entirely.

Q. In other words, in simple language, that had to pass through twelve different types of authority before it became valid? A. Yes, sir.

Q. And all of those things were recorded and are recorded some place in the Army records, all those endorsements? A. They were requested, but it is not required. Correspondence of that sort are not maintained in permanent records of any organization.

Q. Are those records available? A. I don't know, sir.

Q. Are the original records of whoever made that application available any place? A. No, sir, they are not.

Q. How soon are they destroyed after they are made? A. They may be destroyed any time after six months.

372 Q. After six months? A. That is correct.

Q. They were available for a period of six months? A. I couldn't say, sir. I don't know how long they were available after that transfer was effected. Ordinarily——

Q. Excuse me. If they were destroyed within six months they would be destroyed by someone before they should have been destroyed, under Army regulations? A. That would not be a violation of any Army regulations, sir. It is provided in the Army, and it was at the time, that once

the transfer of an enlisted man has been effected the order itself with the authority cited at the bottom of the orders as shown in these cases is sufficient.

Q. Are you familiar with these records, Colonel? A. Yes, sir.

Q. Do you happen to know how long Melvin Usdan and Martin Bayer remained as clerks at the medical base? A. No, sir, I do not.

Q. Do you know that they only remained there five days? A. I don't know that, sir.

Q. You don't know that? A. No, sir.

Q. When they were transferred out of that medical base to either Westover Field or Bradley Field, would that show 374
in this same file? A. No, sir.

Q. Where would you have to go to get that? A. The headquarters issuing the order affecting the transfer of the medical detachment at Mitchel Field would have the same record that you have there on this previous transfer, and that should be available—those orders should be available at the base at Mitchel Field; they should also be available in the medical detachment at Mitchel Field from which the men were transferred.

Q. Where do these records come from? A. From the headquarters of the First Fighter Command.

Q. At Mitchel Field? A. At Mitchel Field.

Q. Are all the records at Mitchel Field under your direction? A. No, sir.

Q. Just what records are under your direction? A. Only 375
the records of the headquarters of the First Fighter Command.

Q. Do those records show whether or not Melvin Usdan or Martin Bayer's status was changed, whether they were clerks before they were transferred to the medical department? A. No, sir. That shows only the status of the man when he was transferred. He was transferred as a 501. That is the only thing that is needed in that record.

Q. What is a 501? A. That is a clerk, administrative or technical. That 501 is a code for the man's military occupational specialty.

Q. Does that mean his last occupation or his coming occupation? A. The occupation at the time of the transfer, sir.

Q. So that he was then a clerk at the time of his transfer? A. That is indicated by that order, sir.

Q. So that you know, then, at the time that this transfer was made to the hospital, to the medical department, that these two boys were clerks? A. According to that record, yes, sir.

377 Q. They were not made clerks after they were transferred; they were clerks before they were transferred? A. It would be assumed, yes.

Q. Your record shows that? A. The record indicates at the time of this transfer they were transferred as clerks.

Q. The record shows that the transfer was initiated by an application made by both of these two soldiers, these two enlisted men? A. Yes, sir.

Q. And is there anything irregular about that, Colonel? A. No, sir.

Q. And if there was to be a regular orderly transfer that would be an entirely proper way to make it? A. Yes, sir.

Q. That happens time and time again in the Army? A. Frequently, sir.

Q. Both with enlisted men and with officers, too, they
378 make applications, too, to be transferred, don't they? A. Yes, sir.

Q. And before this happened there were twelve different endorsements on both of these orders that you have referred to? A. Yes, sir.

Q. So that if these men were transferred for just a period of five days to the medical department, it took twelve endorsements before that happened, from the time they were transferred from the headquarters, Headquarters Com-

pany, to the Medical Department? A. The same endorsements would have been applicable had the transfer been for one day or one year, sir.

Q. That is twelve. Is that the number they always have to be, twelve endorsements to transfer men? A. No, sir. The number of endorsements is governed by the number of offices through which the correspondence passed.

Q. The number of offices or officers? A. Offices.

Q. So that for this transfer to go through it had to go through twelve offices, is that right? A. It wouldn't follow by the number of endorsements that twelve different offices were passed through by that correspondence.

Q. What do these endorsements mean, then? A. Each 380
endorsement means that the correspondence went through a new office from the preceding endorsement, and that the new office put a new endorsement on the correspondence.

Q. Actually when they got—you are stationed at Mitchel Field now, are you? A. Yes, sir.

Q. How long have you been there? A. Almost five years.

Q. You have been there almost all this time? A. Yes.

Q. You were never transferred out of there at all, were you? A. No, sir.

Q. What were you in 1943, what was your rank? A. I was—what time in 1943? I was promoted that year, sir.

Q. In August 1943. A. I was promoted on August 18th to my present grade. Prior to that I was a Major.

Q. You were a Major. These two boys were just trans- 381
ferred from one part of the field to another, were they not, by these two orders? A. That is correct.

Q. Regardless of the fact that the original application for transfer may not be available, there would be a permanent record of every man or every office through which they passed—the transfer application? A. Not necessarily a permanent record. Again it goes back to the fact that each office through which that correspondence passed is not required to keep that as permanent records. Once the

transfer is effective, once the order is issued, even the correspondence itself has no more value to anyone.

Q. When a transfer like that occurs, Colonel, would it have to have the approval of some officer where the two soldiers were before they were transferred? A. Under ordinary conditions it would require the approval. In that particular case the authority to grant the—the headquarters authorized to effect the transfer was the headquarters of the air forces Eastern Defense Command and First Air Force, as appear in that twelfth endorsement. That was the authority to effect the transfer, and that was given to the First Fighter Command by its next higher echelon, the First Air Force.

383 Q. Translate it into a little simpler language, Colonel, for civilians. Just to approve these transfers, these were just—they were just enlisted men, first class privates, I guess both of them were? A. I believe they were, sir.

Q. They wanted to be transferred. A man makes the application to be transferred to another unit on the field. He is still in the air corps, isn't he? A. No, sir.

Q. Is he out of the air corps? A. He is transferred from the air corps to the medical department.

Q. That is not in the air corps? A. No, sir.

Q. Under whose command is the air corps out there—medical department at Mitchel Field? A. It is under the—the medical department at Mitchel Field is under the command of the Commanding General of the First Air Force.

384 The First Fighter Command and Air Corps Unit is also under the jurisdiction of the Commanding General First Air Force, and the Commanding General First Air Force is the only authority, at that time was the only authority who could authorize the transfer from one branch to another, of enlisted people at Mitchel Field.

Q. The commanding officer of that air field? A. No, sir, the commanding general of the First Air Force.

Q. The general of the air force? A. Yes, sir.

Q. He was the only man that could approve this transfer? A. That is right, sir.

Q. Who is he? A. Now it is Major General Hunter.

Q. Who was he in 1943, do you know, at the time? A. I do not recall, sir.

Q. So that do I understand you, in order to get a transfer out of that field you would have to get the Commanding General of the field to approve it? A. The commanding general himself would not come in contact with it. The staff officers would handle that as routine procedure.

Q. Is that true of all the transfers out there, Colonel? A. There are very few transfers that are ever brought to the attention of the commanding general himself. That 386
is what staff officers are for. They handle those.

Q. I understand that. But I am saying, do they all have to be approved by the General? A. No, sir.

Q. Or vicariously through one of his staff men? A. Through the staff officer. But the Base Commander is authorized to transfer personnel between the units of his base. The Commanding General First Fighter Command can transfer enlisted people between the units of the First Fighter Command.

Q. So that we don't get this matter confused, there is nothing unusual as far as that goes? A. No, that is quite general.

Q. It probably happened hundreds of times out there, hundreds of times with other people? A. Yes.

Q. Perhaps thousands of times? A. It is quite possible. 387

Q. And apparently, as far as these records show, it was done in the course of normal operations of the Army, is that right? A. Yes, sir.

Q. At least received the scrutiny of more than ten offices?

The Court: You have asked that.

Mr. Keenan: All right.

The Court: Any further questions?

Mr. Keenan: I have no further questions on that exhibit.

Mr. Robb: We have no questions.

Mr. Keenan: I would like to ask a question of the Colonel.

Q. This just shows the transfer from the headquarters, Headquarters Company, to the Medical Department at Mitchel Field? A. That is correct, sir.

Q. Now supposing these two soldiers remained only five days at this medical department at Mitchel Field and then
389 were transferred to Westover Field or to Bradley Field, there would be some records available, wouldn't there? A. There would be a similar order issued by another headquarters in that case.

Q. Right out there in Mitchel Field? A. Yes, sir.

Q. That is available to be brought in, just the same as th[illegible] available, so far as you know? A. So far as I know, yes, sir.

Q. But these records wouldn't show if a transfer was made from the medical department to Westover Field? A. That is correct, sir, they would not show that.

Q. By the way, where is Westover Field? A. It is in Massachusetts near Chicopee Falls.

Q. Where is Bradley Field? A. It is in Connecticut. I don't recall the nearest town, but it is in Connecticut.

390 Q. I don't care to press that. Since they have been referred to, those are both large air fields? A. Yes, sir.

Q. With perhaps thirty or forty thousand men? A. I wouldn't say there were that many, or ever that many, but it is a large air field. Probably the maximum strength of about nine or ten thousand men at any one time.

Q. They have airborne engineers there? A. They had at Westover Field, as I recall. That is purely recollection.

Q. But you don't have anything to do with those records? A. No, sir.

The Court: Have you any further questions, Mr. McGohey?

Mr. Keenan: Just one further question.

Q. Your records do not trace this Usdan boy and the Bayer boy beyond their arrival at the medical department? A. That is correct, sir. Our records do not indicate that they ever reached the medical department. We issued the order directing that they proceed there.

Q. Anyway, it doesn't go beyond the 20th of July, 1943? A. That is correct, sir.

Q. And doesn't even show they got there? A. No, sir.

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The Court: All right, Mr. McGohey.

Redirect examination by Mr. McGohey.

Q. Now, Colonel, taking up this matter of the twelve endorsements that you talked about, and the ultimate transfer by the Commanding General, one of the officers through whose hands an application of this kind would have to pass on its way to the Commanding General, would necessarily be the immediate unit commander of the man making that request, is that right? A. Yes, sir.

Q. Do you know who was the commanding officer of the headquarters squadron of the First Fighter Command on the 19th of August, 1943, at Mitchel Field? A. I can't say positively, but from my recollection it was Major Radovich. 393

Mr. McGohey: That is all. No further questions.

The Court: All right, stand down. Call the next witness.

394 *Robert B. Travis—For Government—Redirect.*

FELIX L. VIDAL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. You are a Colonel in the United States Army, are you not, Colonel Vidal? A. Yes, sir.

Q. How long have you been an officer of the United States Army? A. Twelve years, sir.

Q. And prior to becoming an officer of the United States Army, were you a cadet at West Point? A. Yes, sir, I was graduated from there.

395 Q. And what is your present duty assignment? A. I am assigned to Headquarters, Army Air Forces, in Washington.

Q. How long have you held that duty? A. For two months.

Q. Prior to that time what was your duty? A. I was a Fighter Group Commander in Italy, and prior to that time, while in Italy, I was a Fighter Wing Commander.

Q. How long were you in the Italian theatre of operations? A. Approximately eleven months.

Q. Prior to that where had you been? A. I was Wing Commander in the Second Air Force in the United States, and prior to that in the First Fighter Command Headquarters at Mitchel Field.

396 Q. Now, were you in Mitchel Field during the Spring of 1943? A. Yes, sir.

Q. Now do you know the defendant Samuel Bayer? A. Yes.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Will you indicate him, please? A. He is the gentleman sitting on the right of the two there.

Q. You mean the gentleman in the brown suit? A. The gentleman in the brown suit.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Will you indicate him, please? A. He is the gentleman in the dark blue suit.

Q. Do you know the defendant Walter V. Radovich? A. Yes, sir.

Q. Will you indicate him, please? A. He is the officer sitting over there (indicating).

Q. When did you first meet the defendant Elias Bayer? A. I would estimate about January of 1943.

Q. And where did you meet him? A. It was in the Copacabana night club in New York City.

Mr. Keenan: What is the date of that, Mr. McGohey? 398

Mr. McGohey: I think he said about January 1943.

Q. Had you gone to the night club with him? A. No, sir.

Q. Were you accompanied by anybody at the time you met him? A. Yes, sir, a Lieutenant Roeser.

Q. What happened after you met him at the night club? A. Lieutenant Roeser and I were standing at the bar and Mr. Bayer was next to us, and during the time we were there he asked me whether I knew an officer who was stationed at Middletown Air Depot in Pennsylvania, and I said yes. And he introduced himself. That was about the context of the conversation.

Q. Did he have any discussion about any of his relatives? A. No, sir.

Q. Now when did you first meet the defendant Samuel 399 Bayer? A. I met him in his office at the Plymouth Thread Company, I think it is.

Q. I say when was that? A Oh, when. That was approximately a month later.

Q. A month after you had first met Elias? A. Yes, sir.

Q. Were you accompanied to the office of the Plymouth Thread Company by anybody? A. Yes, sir. I was accompanied by Lieutenant Roeser.

Q. Now was Elias Bayer there on that occasion? A. Yes, sir.

Q. Did you have a conversation with Elias Bayer and Samuel Bayer? A. Yes, sir.

Q. Will you tell us what that conversation was about? A. It was just a matter of getting uniforms at the I. Buss Company.

Q. Will you tell us a little about that, Colonel? What is the I. Buss Company, if you know? A. I think it is owned by a relative of Mr. Bayer's.

Q. Were you told that by anybody? A. I believe I must have been told that by—in fact I am certain one of the Mr. Bayers told me that.

The Court: What was the name of the uniform company?

The Witness: I. Buss.

Mr. Keenan: Your Honor, could we have the place where this conversation took place?

The Court: He said at the office of the Plymouth—

The Witness: Of the Plymouth Thread Company.

The Court: What was it?

The Witness: It is the Plymouth Thread Company.

Q. Well, will you go on and tell us about this conversation relative to uniforms? A. It was just a matter of they had some very good gabardine over there. I was interested in a summer uniform.

Q. Who told you, if anybody did, that they had good gabardine at the Buss Uniform Company?

Mr. Keenan: I don't like to interrupt, but I would like to have the witness, and to give the substance of the conversation and with whom, rather than to have suggestions made.

Mr. McGohey: I have asked that, your Honor.

The Court: I beg your pardon.

Mr. McGohey: I say I have asked for the substance of the conversation, and I am trying——

The Court: I don't think your question is objectionable. Go ahead. If I recall correctly, you were asked who told you that the Buss Company had good gabardine.

The Witness: Lieutenant Roeser had ascertained that from a previous visit. He told me that, and I came down with him to look it over. In doing so, I met Mr. Sam Bayer. I had met Mr. Elias Bayer previously.

Q. You had this conversation in the office of the Plymouth Thread Company? A. Yes, sir.

Q. Thereafter did you go to the office of the I. Buss Uniform Company? A. Yes, sir. That was the purpose of the visit.

Q. Were you accompanied there either by Elias Bayer or Samuel Bayer? A. By Mr. Elias Bayer.

Q. When you went to the Buss Company, what happened then? A. We were measured; examined the cloth and were measured by the employees of the I. Buss Company.

Q. For uniforms? A. For a uniform.

Q. Was the uniform that you ordered on that day subsequently made and delivered to you? A. Yes, sir.

Q. Did you pay for that uniform? A. No, sir.

Q. Do you know if it was paid for? A. No, sir.

Q. Now subsequent to this meeting with Elias Bayer, when you went to the Buss Company, did you see Elias Bayer at any time after that? A. Yes, sir, I saw him on several occasions.

Q. Were you in his company on those occasions? A. I was twice, yes, sir.

Q. Will you tell us approximately when was the next time you saw him, and where? A. I saw him in his apartment on the occasion of his birthday. I would say that was—that must have been around in May, at one time. I had seen him at another night club in New York; we were not in the same party.

Mr Keenan: May, 1943?

The Witness: That was still in the spring of 1943.

Q. Will you try to keep your voice up a little bit, Colonel, so that the last lady in the jury box can hear you plainly? Now after this day on which you first met Samuel
407 Bayer, did you see him thereafter? A. I saw him on about one or two other occasions, that was about all.

Q. Where were they? A. Once in his office and, oh, that is about all, until he came out to Mitchel Field.

Q. Well, now, can you tell us as nearly as you can recall, the time when you saw him at his office, that is, the second time? A. The second time? I would say about in May.

Q. Of 1943? A Yes, sir.

Q. Now you had a conversation with him on that day, did you? A. Yes, sir.

Q. Can you tell us the substance of the conversation? A. There wasn't much to it except we were—that was about the time we were getting delivery of our uniform.
408 In other words, we would stop by there to go over to the—about the same as the first visit.

Q. This time you were stationed at Mitchel Field, were you not? A. Yes, sir.

Q What was your duty assignment then, Colonel? A. I was the A3 of the First Fighter Command Headquarters. I was in charge of the operations and training of the fighter pilots that were being trained on the East Coast.

Q. Was there a man in the First Fighter Headquarters at that time by the name of Martin Bayer? A. Yes, sir, there was.

Q. Was there an enlisted man there at that time by the name of Melvin Usdan? A. Yes, sir; that was later in the spring.

Q. In the spring of 1943? A. In the spring of 1943. Both of them were there.

Q. At any time that you were in the company of Samuel Bayer did the names of these two men ever come up in the conversation? A. Yes, sir, I think they did. That was before I ever knew them actually by name or had ever seen them. That was probably early in the spring. Mr. 410
Samuel Bayer had made mention of the fact that he had a son stationed at Mitchel Field and also a nephew.

Q. Do you know whether or not Martin Bayer and Melvin Usdan were transferred out of the First Fighter Command? A. I never knew, no, sir.

Q. Do you know whether they ever applied for transfer out of the First Fighter Command? A. I was told, yes, sir.

Q. Now— A. No, I shouldn't say—excuse me. I knew that they were going to be transferred. I didn't know whether there was any application on their part.

Q. Let me ask you this. Did you ever have a conversation with Samuel Bayer about the transfer of Martin Bayer and Melvin Usdan? A. Yes, sir, I did.

Q. A transfer from the First Fighter Command? A. 411
Yes, sir.

Q. Can you tell us approximately when that was? A. That was—that must have been in latter July or early August at the latest, and he informed me that they were transferring from the Headquarters First Fighter Command which was at Mitchel Field to the Base Hospital at Mitchel Field.

Mr. Keenan: The year is 1943 also?

The Witness: 1943.

Mr. McGohey: Yes. I think he said July.

Mr. Keenan: Late July or early August, 1943.

Mr. McGohey: That is what I heard.

Q. You said that Sam Bayer told you that? A. Yes, sir.

Q. Where did he tell you that? A. He told me that at Mitchel Field.

Q. Had Sam Bayer come out to Mitchel Field? A. Yes, sir.

413 Q. Now, prior to his coming that day, did you have a telephone conversation with anybody? A. Yes, sir.

Q. With whom? A. Mr. Elias Bayer.

Q. Will you tell us what the conversation was? A. Yes, sir. He just simply asked me if he could see me that day.

Q. And what did you say? A. I said very well, to come on out to Mitchel Field.

Q. Then subsequently you saw Samuel Bayer? A. Yes, sir.

Q. Was he accompanied by Elias? A. Yes, sir.

Q. Just where physically at the field did you see him? A. I saw them outside the gate. At that time civilians were not allowed to come in the field without the company of officers.

414 Mr. Keenan: What was that, please?

The Witness: Without being accompanied by an officer.

Q. Were they standing outside the field? A. Yes, sir.

Q. You had a conversation with them? A. Yes, sir.

Q. Will you tell us the substance of that conversation? A. I was informed by Mr. Elias Bayer and Mr. Samuel

Bayer that Martin Bayer and Private Usdan were being transferred from Headquarters First Fighter Command to the Base Hospital at Mitchel Field. They requested me to ascertain if these orders had been written at that time.

Q. I didn't get that. A. They requested me to determine for them whether or not the orders had been issued effecting this transfer from the Headquarters First Fighter Command to the Base Hospital.

Q. Did you do anything— A. Yes, sir.

Q. —in connection with that request? A. Such orders, as always, would be issued by First Air Force Headquarters also at Mitchel Field, and so there being no restrictive nature or confidential nature to the orders, I said I would do that. So I went in and checked with the personnel officer in Headquarters First Air Force to find out if these orders had been issued. 416

Q. Did you thereafter come back and talk to them? A. Yes, sir; I came back and informed Mr. Bayer that the orders had not been issued but they were going to be.

Q. What, if anything, did Mr. Bayer say to you?

Mr. Keenan: Which Mr. Bayer?

Q. Mr. Samuel Bayer. A. Mr. Samuel Bayer? As I recall, he wondered if I could do anything about expediting the issuance of the orders.

Q. Was that substantially the end of that conversation? 417
A. Yes, sir.

Q. Now, when was the next time that you saw Samuel Bayer? A. I would say a few days later.

Q. Where did you see him? A. Under the same circumstances, at Mitchel Field.

Q. Outside the gate? A. Yes, sir.

Q. You had a converastion with him? A. Yes, sir.

Q. Was he accompanied by anybody? A. Yes, sir. I think he was with Mr. Elias Bayer.

Q. Will you tell us the substance of that conversation? A. I was told at that time when I was speaking with the Messrs. Bayer, that their—that the son and the nephew were now going to be transferred into an aviation engineer unit stationed at Westover Field, that this aviation engineer unit was scheduled for overseas shipment.

Q. You were told this— A. By Mr. Elias and Mr. Samuel Bayer.

Q. Go ahead, proceed, Colonel. A. Mr. Samuel Bayer was very upset by that and his manner demonstrated that
419 very clearly. He was worried about it. And I tried to explain to him then, realizing that undoubtedly the average civilian would not know what an aviation engineer unit was supposed to do, I tried to explain to him what the functions of that unit would be overseas, and that there was nothing much to worry about, it was relatively a nice, fairly safe, and adventurous type of work. However, he was still wondering whether or not they could be kept from being placed in that unit.

Q. Did he ask you anything on that occasion? A. Yes, sir, he asked me whether I could do anything about that.

Q. What did you say to him? A. I couldn't.

Q. You told him you couldn't? A. Yes, sir.

Q. Was that the end of the conversation on that visit? A. Yes, sir.

420 Q. Now, subsequent to that visit, did you have any further communication from either Samuel Bayer or Elias Bayer? A. I was telephoned several times by I imagine both of them; I spoke to Mr. Samuel Bayer once.

Q. That was a telephone conversation? A. Yes, sir, on the telephone.

Q. Will your tell us what that conversation was?

Mr. Keenan: Could we have the time approximately fixed for that?

A. That must have been within the next few days. It had to be because I left there; I was transferred from Mitchel Field within a week after, about a week after the last time I saw them at Mitchel Field.

This telephone conversation I had with Mr. Samuel Bayer was apparently—was precisely the same conversation I had with him before. He was still worried about his son and his nephew being transferred to the aviation engineer organization at Westover, and wondered whether I could do anything about it. And I couldn't do anything 422
about it.

Q. You so told him? A. I so told him.

Q. That was the last conversation you had with Samuel Bayer? A. Yes, sir.

Q. During this period in the summer of 1943, I think you said that you knew Major Radovich? A. Yes, sir.

Q. He was an officer in the First Fighter Command at that time, was he not? A. Yes, sir.

Q. And he was the commanding officer of the Headquarters Squadron of the First Fighter Command, was he not? A. Yes.

Q. Do you know whether or not the two boys Martin Bayer and Melvin Usdan were under his command at that time? A. Yes, sir, they were.

Q. What was Major Radovich's rank at that time, if you 423
know, Colonel? A. Major Radovich was then a captain.

Mr. McGohey: I have no further questions.

By the Court.

Q. Did I understand you to say that Captain Radovich was then the commanding officer of the Headquarters Company? A. Headquarters Fighter Squadron.

Q. Not a company? A. Not company, but a squadron. That, your Honor is—the Headquarter's squadron contains all the personnel that work in the Headquarters.

Q. Of the First— A. Of the First Fighter Command.

Q. First Fighter Command? A. Yes, sir.

The Court: I think we will take a recess here, gentlemen, and have the cross-examination after we have the recess. Colonel, I wish you would retire to the witness room and do not discuss the case with anyone until you have completed your testimony.

The Witness: Yes, sir.

425 The Court: And we will take a recess of ten minutes now.

(Short recess.)

Cross-examination by Mr. Keenan.

Q. Colonel Vidal, how old are you? A. I am thirty-three years old.

Q. And the name of Vidal is fairly well known in the air service of the country, isn't it? A. Yes, sir.

Q. You met Elias Bayer, as far as you know, purely by accident that night at the Copacabana? A. Yes, sir.

Q. You don't think he was, as far as you know, lurking around on the outside to see you come in there? A. No, sir.

Q. As far as you know, he didn't know who you were, or 426 where you were stationed at the time he met you, did he? A. No, sir.

Q. You were in there, officers, having a little relaxation in a night club? A. Yes, sir.

Q. And that is not uncommon in the Army in this country? A. No, sir.

Q. Was there anything extraordinary about the conduct of Elias Bayer at all to distinguish him from other people that you have met from time to time? A. No, sir.

Q. He was gentlemanly in his conduct? A. Yes, sir.

Q. There was nothing hilarious or boisterous about the meeting? A. No, sir.

Q. You came down to his office after that? A. Yes, sir.

Q. When you say the Plymouth Thread Company, that is located at 20th Street, I believe, 21st Street, off Broadway, and they have a little office up on the second floor? A. Yes, sir.

Q. And that is where you went? A. Yes, sir.

Q. And that is where you met Samuel Bayer? A. Yes, sir.

Q. You never saw him before that time? A. No, sir.

Q. Nor had you talked to him before that time? A. No, 428
sir.

Q. And you didn't know that he had a boy in the service at that time? A. No, sir.

Q. And nothing was said at your first meeting at least about his having any boy in the service that you recall? A. No, sir.

Q. The first time that there was a discussion that you recall, if I may sum up your testimony as I heard it correctly, was when Elias called you and asked you if he could come out to see you with his brother Sam, is that right? A. No, sir.

Q. Well, a conversation took place in their office first? A. Yes, sir.

Q. At that time did they ask you to do anything for 429
them? A. No, sir.

Q. At all? A. No, sir.

Q. Had you your uniform at that time? A. No, sir.

Q. Was there any statement made to you "If we get you a uniform you don't have to pay for it"? A. No, sir.

Q. Or "If we get you a uniform we will expect you to do something for it"? A. No, sir.

Q. Or anything implied from the circumstances, as far as you know? A. No, sir.

Q. Coming now to the time when you met them outside the gate, I believe you fix that as some time late in July or early in August of 1943? A. Yes, sir.

Q. And you have I think made it clear if I recall correctly, that no civilians could get inside that camp unless they had some pass or else were accompanied by an officer? A. That is true.

Q. That is true today as far as you know out there, isn't it? A. Yes, sir.

Q. And has always been the habit out at that field, is that right? A. That is right.

Q. So when Samuel Bayer came out the first time he, as
431 I recall, asked you if you would look up to see whether or not a transfer had taken place? A. Yes, sir.

Q. He didn't ask you to make the transfer, did he? A. No, sir.

Q. Or to have anything to do with it, did he, except to look up and see whether it had taken place or not? A. I will qualify that.

Q. All right, please qualify it. Let us have the whole story. A. Yes, sir. After he learned that the orders hadn't been issued, he wondered whether or not I could do anything to expedite them.

Q. Yes, that is right. But first he asked you to look up and see whether or not the orders had been issued? A. Yes, sir.

Q. And you did? A. Yes, sir.

432 Q. Was there anything wrong about that, Colonel? A. No, sir.

Q. Have you done matters like that, or do officers do that from time to time in the Army? A. Yes, sir.

Q. That has happened with a great big Army and with a lot of people in it; that is not infrequent, is it? A. No, sir.

Q. Nothing wrong about it that you know of? A. No, sir.

Q. And you were not derelict in your duty in looking that up, were you? A. No, sir.

Q. You didn't so consider it then? A. No, sir.

Q. And don't so consider it now? A. No, sir.

Q. And you found that the transfer hadn't taken place; right? A. That is true.

Q. And then you told that to Samuel Bayer? A. Yes, sir.

Q. Then he asked you if you could expedite it? A. Yes, sir.

Q. Did he offer to give you anything if you did that? A. No, sir.

Q. Did he attempt to corrupt you at that time? A. No, sir.

Q. In any manner? A. No, sir. 434

Q. And, by the way, we are here in a court of justice, you are representing the United States Army as a witness called by the Government—did Samuel Bayer as far as you could determine, attempt to corrupt you in any manner at any time that you have known him up to today? A. No, sir.

Q. Now when he came out the second time to the field that was a few days after his first visit to the field, there had been a transfer then of these two boys to Westover or Bradley, he told you? A. Yes, sir.

Q. And these boys you knew were clerks on duty? A. Yes, sir.

Q. And they have many clerks in the Army, do they not, Colonel? A. Yes, sir.

Q. They couldn't run the Army without clerks, could they? A. No, sir. 435

Q. There is nothing menial or wrong about the job of being a clerk in the Army? A. No, sir.

Q. Did you ever see Martin Bayer at the time you had these discussions with his father? Had you ever seen him? A. Yes, sir, I had seen him.

Q. Will you describe him to us, if you can? I realize you— A. No, sir. I could say that he was dark haired and

I would say about 19 or 20 years of age, probably about 5 feet 10 inches tall.

Q. Was he a big rugged fellow or slight in build? A. As I recall, he was slight.

Q. And if we could find a little bit more about the conversation, after the boys had been transferred to Westover Field—I won't draw any distinction between Westover and Bradley; they are about the same type encampments, aren't they? A. Yes, sir.

Q. By the way, they could not have been very long in the hospital unit, could they? A. No, sir.

Q. A matter of a few days at the outside? A. That is
437 true.

Q. They were clerks; they were not sent as patients to the hospital? A. No, sir.

Q. They were sent there for clerk duty at the hospital? A. Yes, sir.

Q. They had been clerks before in the Army? A. Yes, sir.

Q. So they carried their clerical duties on the same field, only to the medical unit, where they had clerks there; right? A. Yes.

Q. And had to have clerks there? A. Yes, sir.

Q. So when Samuel Bayer talked to you after they had been transferred from the medical department at Mitchel Field to Bradley Field or Westover Field, he was very excited, I think you said? A. Yes, sir.

438 Q. Quite agitated? A. Yes, sir.

Q. And he was disturbed, was he not, about the fact that these boys now were in the airborne engineers apparently slated for immediate overseas service? A. Yes, sir.

Q. And that excited him very much apparently? A. Yes, sir.

Q. And he showed that to you? And you attempted to calm his fears? Is that a fair statement, Colonel? A. Yes, sir.

Q. His son was about 19 years old, as you described? A. I think he was.

Q. He had been a clerk all the time he had been at the field and now his father saw a picture of him being a paratrooper with the engineers; is that right? A. Yes, sir.

Mr. McGohey: I object to this, if your Honor please. I am fraid it is too much like summation.

The Court: Objection sustained.

Q. And you explained to him that it was a good thing—I think you used the words "good, safe enterprise", that they were in, something of that nature? A. Yes, sir. 440

Q. What were the duties of these boys to be in the airborne engineers?.

Mr. McGohey: If the Colonel knows.

Mr. Keenan: If he doesn't know, then he won't tell us.

The Court: I think he has a general idea. Go ahead.

A. My knowledge is very limited. I have worked with aviation engineers overseas. They normally do the flight strip a flying organization will operate from; they put the hard stands in. In other words, they build an airdrome. They do construction work other than that. But normally that is their function, to prepare an airdrome for a combat aviation unit. 441

Q. You would know that, Colonel, but a man outside the Army would not know that. A. That is very true.

Q. And apparently Samuel Bayer didn't know that?

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Well, I will not press it.

Q. Did he ask you if you could do something to keep them here longer in this country? A. Yes, sir.

Q. And you told him you couldn't? A. I told him I could not and would not.

Q. And wouldn't. Did he offer you any inducement if you would do it? A. No, sir.

Mr. Keenan: That is all.

Cross-examination by Mr. Robb:

Q. Colonel Vidal, what was your rank at the time that these various things you have told us about took place, your meeting with the Bayers, and so on? A. I was a Lieutenant Colonel at the time I met the Bayers; at the time
443 that they came to Mitchel Field I was a Colonel.

Q. What was your duty at that time? What was your assignment at that time? A. My assignment was A3, or operations officer of the First Fighter Command.

Q. What was the duty of the defendant Radovich, Captain Radovich at that time? A. Captain Radovich at that time was the commanding officer of the Headquarters Squadron of the First Fighter Command.

Q. He was not under you, is that correct? A. No, sir.

Q. Who was your assistant? A. I had several assistants.

Q. Was there a Colonel Jacobson? A. Yes, sir.

Q. Now, at the time that you first met the defendant Elias Bayer, how long did you talk to him that night? A. I would say the conversation probably covered a period of
444 an hour or two, but during that time I was only a few minutes with him.

Q. When you parted, did you have some understanding about seeing him again? A. No, sir.

Q. How did you next hear from him? A. I heard from him through Lieutenant Roeser, who was with me that night.

Q. You mean you heard from Lieutenant Roeser? A. That he had been down to see Mr. Bayer.

Q. You were invited to go on a party with Mr. Bayer, were you? A. No, sir.

Q. Well, afterwards you were asked to go on a party with Mr. Bayer, weren't you? A. That was much later on.

Q. How much later? A. I would say a good month or two.

Q. In fact, you went to Mr. Bayer's apartment to one party, didn't you, sir? A. Yes, sir.

Q. How long after your first meeting was that? A. I imagine at least two to three months.

Q. Who else was there? A. I think Lieutenant Roeser, and I think Colonel Jacobson.

Q. There wasn't anything wrong about that? A. No, sir. 446

Q. Was Mr. Bayer's wife there? A. Mr.——

Q. Elias Bayer. A. He was not married at the time.

Q. By the way, at that time were you married? A. Yes, sir.

Q. Was your wife there? A. No, sir.

Q. Where was she? A. She was at Mitchel Field.

Q. Did you afterwards go on other parties with Mr. Bayer, either of the Bayers? A. I went to a birthday party of Mr. Elias Bayer. That was another time.

Q. Where was that given? A. That was given in his apartment.

Q. How long afterwards was that? A. I would say that took place in May or June.

Q. There wasn't anything wrong about that, was there? A. No, sir. 447

Q. Were other officers present? A. I think I saw Major Radovich. He wasn't there all evening.

Q. Was his wife with him? A. I don't recall.

Q. Who else was there? A. Mrs. Jacobson and Colonel Jacobson and Lieutenant Roeser and myself, and I think there were several friends of Mr. Bayer.

Q. Did you go on any more parties with them? A. No, sir.

Q. Now, Colonel, as I recall your testimony, you told us that the first time you talked to Mr. Sam Bayer outside the gate, he asked you whether or not you could expedite this transfer? A. Yes, sir.

Q. I don't recall whether you told us what your reply was. Would you tell us. A. My reply was that I couldn't.

Q. That you couldn't? A. That is true.

Q. Let me ask you, Colonel, where did you have to go to find out about this transfer. A. At headquarters of the First Air Force, which is about a hundred yards from the headquarters that I worked in.

Q. How far from the gate was that? A. I would say
449 physically three-fourths of a mile.

Q. You hopped in your car and went over there? A. Yes.

Q. And checked up with some officer, there, I assume? A. Yes, sir.

The Court: Is the transfer you are now referring to the transfer from the Fighter Command to the Medical Corps?

The Witness: Yes, sir.

Q. You found, I believe you told us, that the transfer was in process but it hadn't yet been completed, is that right? A. Yes, sir.

Q. On whose desk was it, if you know? A. I wouldn't know, sir. That was just—in other words, I talked to the
450 officer who was in charge of issuing orders on transfers.

Q. Who was that officer? A. I don't recall.

Q. It wasn't Major Radovich? A. No, sir.

Q. By the way, Colonel, when did you leave Mitchel Field? A. I left Mitchel Field approximately the 26th of August, 1943, the 26th or the 28th.

Q. Where did you go from there? A. I went to Colorado Springs for a station, Colorado Springs.

Q. How long did you stay there? A. I stayed there until August, 1944.

Q. Then you went to Italy? A. Yes, sir.

Q. When did you arrive in Italy? A. I arrived in Italy on the 8th of August, 1944.

Q. Now, Colonel, when did you first learn that you did not have to pay for these uniforms or this uniform which you got? A. I wouldn't have paid for the uniforms anyway. I didn't want them. They didn't fit and they didn't look well. I have never worn them.

Q. How many did you get? A. I had one summer uniform and one winter.

Q. And one winter? A. Yes, sir. 452

Q. Would you answer my question—when did you first learn or decide that you didn't have to pay for them or you weren't going to pay for them? A. Right after I received them.

Q. Who told you that? A. No one told me that. I wasn't going to pay for them. I told Lieutenant Roeser to tell Mr. Bayer that the uniforms weren't satisfactory.

Q. Did you get any message back? A. Yes, sir. He said, "Forget about the whole thing."

Q. You kept the uniforms? A. They are in storage.

Q. There wasn't anything wrong about that, was there? A. I don't believe so.

Q. You weren't conspiring with anybody? A. No, sir.

Mr. Robb: That is all. Thank you. 453

The Court: Any further questions?

Mr. McGohey: I have no further questions, your Honor.

The Court: All right. Call the next witness.

454 *Joseph Busch—For Government—Direct.*

JOSEPH BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGoldrick.

Q. Mr. Busch, where do you live? A. Sir?

Q. Where do you live? A. 4217 Sixteenth Avenue, Brooklyn.

Q. Where is your place of business? A. 84 Fifth Avenue, New York City.

Q. What is your business? A. Manufacturer of uniforms.

455 Q. What is the name of your company? A. I. Buss Uniform Company.

Q. Did you give us the address? A. 84 Fifth Avenue.

Q. What street is that near? A. The corner of 14th Street.

Q. Fourteenth Street and Fifth Avenue? A. And Fifth Avenue.

Q. Are you related to the defendant Samuel Bayer? A. Yes, sir.

Q. What is your relationship? A. Brother-in-law.

Q. Mrs. Bayer is your sister? A. Yes, sir.

Q. How long have you known Samuel Bayer? A. Oh, I guess about thirty years, over thirty years.

Q. You know his brother Elias Bayer, do you? A. Yes, sir.

456 Q. They are here in the court room, are they not? A. Yes.

Q. The gentlemen sitting here (indicating)? A. Yes, sir.

Q. Do you know an officer in the United States Army named Major Morris Saffron? A. Yes, sir.

Q. Where did you first meet Major Saffron? A. At my place of business.

Q. Was he a customer of yours? A. He came up to buy a uniform.

Q. Do you recall about when that was? A. No; I don't recall whether it was '42 or '43.

Q. Were you ever in the company of Major Saffron and Samuel Bayer at the same time? A. Yes, sir.

Q. When was that, that you were in their company? A. We had lunch together.

Q. When was that? A. Oh, in 1943, I believe.

Q. What part of 1943? Can you fix the time a little more definitely than that? A. It might have been about the spring.

Q. Where did you have lunch together? A. In a restaurant, a couple of blocks away from 39 Whitehall Street.

Q. Do you know whether or not Major Saffron at that 458
time was stationed at the Army Building in 39 Whitehall Street? A. Yes, sir, he was stationed there.

Q. You and Mr. Bayer and Major Saffron had a conversation at that luncheon? A. Yes, sir.

Q. Will you tell us the substance of the conversation? A. Well, we sat down and he asked Mr. Bayer——

Mr. Keenan: Excuse me. I want to interpose an objection to that on behalf of Elias Bayer if it was Samuel that was doing the talking.

Mr. McGohey: I submit that this is an act in furtherance of the conspiracy.

The Court: I will rule. I am going to overrule the objection and treat it as a motion to strike out if it is not properly connected. Go ahead. 459

Mr. McGohey: Mr. Reporter, will you read the last question?

(Question and answer read.)

A. (Continuing) We sat down and he asked how Mr. Bayer's boys were, and he asked me how my son was, and then after that we had a general conversation.

Q. And that was all there was to that? A. Yes, sir.

Q. You say that was some time in the spring of 1943? A. Yes, sir.

Q. Now I direct your attention to the summer of 1943, specifically to some time in August, 1943. Did you meet Samuel Bayer and Major Saffron at or about that time? A. Yes, I met them.

Q. What? A. Yes, sir.

Q. In the summer of 1943? A. Yes, sir.

Q. Where did you meet them? A. At the hotel, the Governor Clinton Hotel.

Q. Prior to that meeting did you have a conversation with Samuel Bayer any time that day? A. Yes, sir, in the
461 morning.

Q. Was that a personal conversation or was it by telephone? A. By telephone.

Q. Had you called Samuel Bayer or had he called you? A. He called me.

Q. You know Sam Bayer's voice? A. Yes, sir.

Q. What did he say to you? A. He called me that one morning and told me——

Mr. Keenan: Just a minute. I want to renew the objection to this conversation without proof of any conspiracy or any reason that I can see so far in this evidence why it should bind Elias Bayer.

The Court: The same action on your objection—objection overruled, and I am going to treat it as a
462 motion to strike out.

Mr. Keenan: Exception.

The Court: Go ahead. I treat it as a motion to strike out if the proper connection does not appear.

Mr. McGohey: Yes, your Honor.

The Court: You may proceed.

Mr. McGohey: May I have the question read.

(Question and answer read.)

A. (Continuing) And told me that the boys were being transferred.

Q. Did he mention what boys? A. Well, when he said "boys" I understood that it was Martin Bayer and Melvin Usdan.

Q. Did he say where they were being transferred? A. No, sir.

Q. What else did he say? A. And he asked me whether I wouldn't call up Major Saffron if he would do something "for me" or find out what happened over there.

Q. What, if anything, did you say? A. I said I would. And I called up Major Saffron and told him, and he said he would call me back in the afternoon.

Q. Did he? A. And he called me back in the afternoon, and I called up Mr. Bayer and told him that I made an appointment at the Governor Clinton.

Q. An appointment for whom? A. For him in the evening at the Governor Clinton.

Q. What, if anything, did Sam Bayer say? A. He said he was too nervous to go up and wouldn't I go up there and he would meet me later, and I said I would.

Q. Did you that evening go to the Governor Clinton Hotel? A. Yes, I went up to the Governor Clinton.

Q. When you got to the Governor Clinton, did you meet Sam Bayer there? A. I met Mr. Bayer.

Q. Then what happened? A. Then I met Major Saffron.

Q. Yes. A. And then Mr. Bayer said he would wait outside. And I met a Lieutenant Fabbricatore with Major Saffron.

Q. And where were you at this time? You were in the company of Major Saffron and Lieutenant Fabbricatore? A. Yes.

Q. Where in the hotel were you at this time? A. We went up to the balcony.

Q. When you were— A. Oh, at the time we were down in the lobby, we met him down in the lobby.

Q. Then what did you do? A. We went up to the balcony.

Q. Then what happened? A. And Lieutenant Fabbricatore and Major Saffron——

Mr. Keenan: Just a minute. If there is going to be any conversation now outside the hearing of Samuel Bayer, I would like to object to that. The question is asked, "Now what happened?" I may get a conversation that would be improper.

The Court: Are you leading to the conversation?

Mr. McGohey: I am leading to the statement that 467
there was a conversation but not any conversation except conversation in which the defendant Bayer participated.

The Court: All right.

Mr. Robb: If the Court please, I assume that all these conversations will of course not come in against the defendant Radovich unless there is some connection shown.

The Court: That is right.

Mr. Keenan: May I ask the Court at this time, instead of interrupting continuously, which I dislike to do, but I want to save my record as a lawyer, if we can consider an objection being made to every question that is asked of any statements made outside of the 468
presence of the individual defendants until and unless something by way of conspiracy is shown?

I understand your Honor is following the ruling of permitting all this testimony to come in subject to a motion that we can strike it out if it is not connected up. With great respect we object to that manner of doing it, we think it is not in accordance with our rights; we want to save our record, but we don't want to continue to object.

The Court: I am going to pursue that course. If a proper connection is not shown then I will entertain your motion. I don't much like these blanket objections. I understand you, sir. I think it would probably be better if there is anything which you wish to object to, that you simply just indicate that you do object, and I will make the ruling.

Mr. Keenan: All right, your Honor, I will abide by that. But I am sorry, I will have to object to every question that is asked of conversations that took place outside of the hearing of the defendant I represent until—and under the authority——

The Court: Well, don't let us have a legal argument 470
here. I will hear you on that fully if you wish to be heard, in the absence of the jury. I think it would be probably a better plan as to any conversation—there are three defendants you see; some conversations have been testified to with one, two—I don't think there are any so far with three; but for the rest of the afternoon certainly I would prefer for you not to ask each individual question, but as to the line which then develops——

Mr. Keenan: Your Honor understands why I have to do that.

The Court: I understand.

Mr. Keenan: I don't intend to be offensive by interrupting, but I will have to do it.

The Court: Certainly. All right, go ahead. 471

Mr. McGohey: Mr. Reporter, will you read the last question?

(Record read as follows: "Q. Then what happened? A. And Lieutenant Fabbricatore and Major Saffron——")

A. (Continuing) —walked to the rear and let me stand there, and they had a conversation together for about five minutes.

The Court: Who had the conversation?

The Witness: Lieutenant Fabbricatore and Major Saffron.

Q. Then what happened next? A. Then they came over to me and Major Saffron asked Lieutenant Fabbricatore—

Mr. Keenan: Just a minute. I object to that conversation.

Mr. McGohey: He hasn't got to the conversation, I submit, your Honor. Maybe I could clarify it by this question.

473 Q. When Major Saffron and Lieutenant Fabbricatore came back and joined you, was there a conversation among the three of you, without telling us what the conversation was? A. No. He just asked Fabbricatore——

Q. Wait a minute. Did the three of you talk together? A. No, sir.

Q. Was there a conversation between Major Saffron and Lieutenant Fabbricatore in your presence, without telling us the conversation? A. When they went to the rear?

Q. No. When they came back to you? A. No.

Q. You just said Major Saffron asked something? A. Well, he just started to ask him a question.

Q. He talked to Fabbricatore, is that it? A. That is right.

474 Q. Did Fabbricatore talk to him? A. No. He asked him a question to tell me.

The Court: Don't tell us what the question is. Just whether they did have a conversation.

Q. There was some talk between Saffron and Fabbricatore in your presence—some talk, some words expressed by each, is that correct? A. Well, I don't remember.

Q. I didn't ask you what they were. I say, they did utter words to each other, is that correct? A. Not when they came over to me.

Mr. Keenan: Just a minute. This is a Government witness and I will object to the leading form of the question. I think the witness ought to testify instead of the learned United States attorney.

Mr. McGohey: I am leading only for a purpose—I don't want any part of any conversation.

Q. The three of you came back and were together, were you? A. Yes, sir.

476

Q. Then what happened after that? A. Major Saffron asked Fabbricatore——

Q. Never mind what he asked him. The three of you were together on that balcony? A. Yes, sir.

Q. Then what happened? A. Then I was all through.

Q. Well, did you stay on the balcony? A. Yes, sir.

Q. Did you stay on the balcony? A. No, we went off the balcony after he had the conversation there, when he was through with me.

Q. You came downstairs, did you? A. Yes, sir.

Q. Then tell me what happened? A. Major Saffron walked out the side entrance with Lieutenant Fabbricatore and Major Saffron told me to wait in the lobby there until he got back.

477

Q. Did he come back? A. He returned in a few minutes.

Q. Then what happened? A. Then Major Saffron and I walked outside and met Mr. Bayer.

Q. That is, Mr. Samuel Bayer? A. That is correct.

Q. Then what happened? A. Then Mr. Bayer suggested that we take a cab, which we did; and we rode around for about fifteen minutes.

Q. You got into this taxicab? A. Yes, sir.

Q. It was yourself, Sam Bayer— A. Yes, sir.

Q. And Major Saffron? A. That is correct.

Q. Was there a conversation among the three of you in the taxicab while you were riding around? A. Yes, sir.

The Court: It may be noted that you object there. All right, go ahead.

Q. What was that conversation? A. Mr. Bayer asked him if there is anything that could be done for him.

Q. Mr. Bayer asked whom? A. Major Saffron—if anything could be done for him, and he said "Nothing".

Q. Did he say anything could be done for him? Did he say what about? A. About the boys.

479 Q. Yes? A. And he said no, he couldn't do anything for him.

Q. Did Major Saffron say anything else? A. Then he asked him what—Mr. Bayer asked him what happened.

Q. And what did Major Saffron say? A. Major Saffron told him that there was a rumor around that Mr. Bayer had spent a lot of money.

Q. A rumor around where? A. Around the field.

Q. What did Samuel Bayer say, if anything, to that? A. He didn't say anything to that. Major Saffron didn't want to listen to him any more. He told him to forget about everything.

Q. Did Samuel Bayer say anything in addition to what your have testified? A. No, sir.

480 Q. Is that the substance of the entire conversation? A. No. We had a general conversation after he got through with that.

Q. Then you say you rode around for about fifteen minutes? A. Yes, sir.

Q. Where did the ride end? A. We stopped by the hotel, at the Pennsylvania Station there.

Q. You came back directly to the Governor Clinton Hotel? A. Yes, sir.

Q. And then what happened? A. Mr. Bayer went home and I went home, and Major Saffron.

Q. The three of you separated? A. That is right.

Mr. McGohey: I have no further questions, your Honor.

The Court: You may cross-examine.

Cross-examination by Mr. Keenan.

Q. Did Samuel Bayer offer any money to anybody while you were there? A. No, sir.

Q. Did he offer any money to Major Saffron? A. No, sir.

Q. He was a Major in the United States Army, wasn't 482
he? A. Yes, sir.

Q. Was Mr. Samuel Bayer agitated at the time—excited? A. Well, he was a little bit nervous.

Q. Do you know where the boys were at the time of this conversation? Do you know what camp they were at, or where they were stationed? A. I think they were still at Mitchel Field.

Q. Do you know? A. No, I am not sure. I say I think.

Mr. Keenan: That is all.

The Court: All right, you may be excused.

The Court: I think it would cover the situation, gentlemen, and protect the rights of each of you if it be noted that there is a general objection and continu- 483
ing one as to each defendant as to the recital of any conversation with any of the three defendants not in the presence of all three.

Mr. Keenan: Yes, sir.

Mr. Robb: It will all be subject to a motion to strike, if the Court please.

The Court: The same thing.

Mr. Keenan: Thank you.

484 *Philip Busch—For Government—Direct.*

PHILIP BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Wallace.

Q. Mr. Busch, you are a partner in the I. Buss Uniform Company? A. That is right.

Q. Who are the other partners? A. Joseph and Harold Busch.

Q. You are also related by marriage to Samuel Bayer? A. That is right.

Q. He is your brother-in-law? A. That is right.

Q. Do you know Elias Bayer? A. Yes, I do.

485 Q. Do you know Major Radovich? A. Yes, I do.

Q. Do your know an officer in the United States Army named Major Saffron? A. Yes, I do.

Q. Where did you first meet Major Saffron? A. Well, he was up at our place to buy some uniforms.

Q. Do you recall when that was? A. That was in the year 1941, before Pearl Harbor.

Q. Now, after you made up uniforms for him, did you ever meet Major Saffron again? A. Well, he was up the place again after that, after he took out the first uniform.

Q. Did you ever meet him away from the place of business? A. Yes, I did.

Q. Where did you meet him? A. Down at 39 Whitehall Street.

486 Q. Do you recall approximately when that was? A. That was in the year 1942.

Q. Do you know what part of the year? A. I think it was in the summer time, around the summer; either the spring or the summer time.

Q. Did you meet him at 39 Whitehall Street? A. Yes, sir.

Q. Will you tell the jury, if you can recall, how you happened to meet him at 39 Whitehall Street? A. I called up Major Saffron and told him my brother—my brother-in-law Mr. Bayer——

Mr. Robb: If your Honor please, we object to that.

The Court: Don't give us the conversation.

Q. Prior to your call to Major Saffron, had you received a telephone call from anyone? A. Yes, I did.

Q. From whom? A. Mr. Bayer, Samuel Bayer.

Q. What did Mr. Bayer say to you? A. He asked me if I knew someone downtown he could get some information about enlisting his boy in the air force.

Q. What did you say to him? A. I said I did.

Q. Then you called Major Saffron? A. I did, yes.

Q. Thereafter did you see Major Saffron? A. Yes. I think it was the following day, I called him up that day, and I went down there, and it was in the morning, and I 488 think we went down in the afternoon.

Q. Who went down? A. I went down with Mr. Bayer.

Q. Which Mr. Bayer? A. Samuel Bayer and his boy, Robert Bayer.

Q. Robert Bayer? A. That is right.

Q. Did you have a conversation with Major Saffron? A. Well, the only conversation I had with Major Saffron was just to tell him that Mr. Bayer wanted to get some information about his boy enlisting in the air corps.

Q. Did Samuel Bayer then have a conversation with Major Saffron? A. Yes; he just spoke to him and told him that his boy wanted to enlist in the air corps.

Q. Can you recall that conversation? A. Well, I wasn't there; I couldn't exactly recall the whole conversation. 489

Mr. Keenan: If he wasn't there I don't think we ought to have the conversation.

The Court: He just testified he was there, I thought.

Mr. Keenan: He just said he wasn't there.

The Court: It is a little bit conflicting.

Mr. Robb: If the Court please, I understand this was some other boy, not the boy involved in this indictment.

The Court: I understand that, but it is this defendant. I am going to overrule the objection on that ground. Clarify whether he was there or not and heard the conversation.

Q. Were you present during a conversation between Samuel Bayer and Major Saffron at 39 Whitehall Street? A. Yes, I was.

Q. As best you can recall, will you tell us what that conversation was?

Mr. Keenan: May we have the time fixed, to see whether it is even within the time described in the in-
491 dictment.

Q. When was the conversation? A. It was in the afternoon.

Q. What year? A. 1942. It was either the spring or summer time. I just can't recall the exact time.

Mr. Keenan: I object to it as being outside of the date of the conspiracy.

Q. Could it have been in September, 1942?

Mr. Keenan: I object to that, your Honor.
The Court: The objection is overruled.

492 A. No, it was not September.

The Court: Was it earlier than September?
The Witness: Yes, it was earlier than September.
The Court: I will sustain the objection.

Q. Then you had this conversation. Did your ever meet Major Saffron again? A. Yes. About a week later.

Q. Where? A. At 39 Whitehall Street.

Q. Were you alone? A. I was with Mr. Bayer and Robert Bayer.

Mr. Robb: Which Mr. Bayer?
The Witness: Samuel Bayer.

Q. That would be about a week later. It would also be in the spring or summer of 1942? A. That is right.

Q. Now, after that second meeting, did you ever meet Samuel Bayer and Major Saffron again? A. Yes. That was some months later.

Q. Where? A. At the Induction Center.

Q. Where was the Induction Center? A. At the Grand Central Building. 494

Q. Would that be after September 1, 1942? A. Yes, I believe it was.

Q. In whose company were you when you went up to the Induction Center at Grand Central? A. Well, Mr. Bayer was with me and I think his boy, Martin Bayer.

Q. Anyone else? A. Well, I don't recall anyone else with us at the time.

Q. Will you tell the jury how you happened to be there at that time? A. Well, Mr. Bayer asked me if I couldn't get in touch with Major Saffron. He told me that his other boy wanted to enlist in the air corps.

Q. Did he say anything else to you at that time? A. No, he did not, just that he wanted to enlist in the air corps.

Q. What did you do when he told you this? A. Well, I went along with him and I met Major Saffron, and Mr. Bayer and Martin, rather, went inside and told him that he wanted to enlist in the ground crew of the air corps.

Q. What else was said, if you remember? A. Well, that is all. I mean, he just gave him the information. He said that he coul still enlist, there were still openings yet.

Q. What was this about there still being openings? A. There were still openings in the air corps yet in the ground crew.

Q. Who said that? A. Major Saffron.

Q. Had he been asked any question before he made that statement by anyone? A. Not that I know of.

Q. He just made the statement without reference to any question that had been asked? A. Well, I guess he knew that there were some openings there.

Q. Was there any mention made to you about the infantry service at that time? A. No, there wasn't, sir.

Q. Was there any mention made about anything that had appeared in the newspapers at that time? A. No.

Q. Do you know Major Radovich? A. Yes, sir, I do.

Q. Where did you first meet him? A. Up at my place of
497 business.

Q. Do you know Colonel Vidal? A. Yes, I do.

Q. Colonel Jacobson? A. I do.

Q. Lieutenant Roeser? A. I do.

Q. Where did you meet these officers? A. Up at our place of business.

Q. Did they come there together? A. Well, no, they didn't all come together.

Q. Had you known them before they came to your place of business? A. No, I did not.

Q. Did anyone introduce you to them? A. Well, nobody introduced me to them; just that I took their measurements and I knew their names, I knew who they were.

Q. Was there anyone with them at any time who was not an officer? A. Yes.

498 Q. Who? A. Elias Bayer.

Q. Did he bring them up there? A. Yes, he did.

Q. When he brought them up did you have any conversation with Elias Bayer? A. No, I did not.

Q. Did you make uniforms for these officers? A. Yes, we did.

Q. Were you ever paid for making these uniforms? A. Yes.

Q. Who paid you? A. The Plymouth Thread.

Q. You say the Plymouth Thread? A. That is right.

Q. Did you receive a check from them? A. I suppose so.

Q. Do you know? A. Well, I wouldn't know. My brother Hal would know more about that because he takes care of the books.

Q. Is this Plymouth Thread a partnership? A. I guess so.

Q. Who are the partners? A. I really couldn't tell you.

Q. Is Sam Bayer a member of the partnership? A. That is right.

Q. Is Elias Bayer? A. I don't know.

Q. Now when Elias Bayer was at your place of business with these officers, did he introduce them to you? A. Well, 500
no. He didn't introduce them to me. Just my brother told me to—Elias told my brother to have somebody measure these officers for the uniforms, see.

Q. Was anything said about payment? A. No, not to me.

Q. Was it said to anyone in your presence? A. I don't know, it might have been said to Harold.

Q. Your brother, Harold Busch? A. That is right.

Mr. Wallace: No further questions.

Cross-examination by Mr. Keenan.

Q. By the way, you have used the name Major Saffron. Do you know what branch of the Army he was in? He was a doctor, wasn't he? A. That is right; he was a doctor. 501

Q. He was the medical man? A. That is right.

Q. When he was brought down there he was the one that had to do with arranging the physical examination? A. I don't know—yes, he arranged the physical examination, that is right.

Q. And there was some talk with him? A. You mean did I have any talk——

Mr. Keenan: I withdraw that.

502 *Philip Busch—For Governmgnt—Cross.*

Q. Have you discussed this case with the United States attorney and his assistant? A. Yes.

Q. How many times? A. I don't know, about six, seven times.

Q. Where? A. Well, I was in Mr. Wallace's office a few times and I think I was up to Mr. McGohey's office.

Q. Mr. Wallace is the young gentleman, the assistant U. S. attorney who asked you the questions? A. That is right.

Q. You were up in his office a few times? A. That is right.

Q. You have been over this whole story with him, is that correct? A. That is right.

503 Mr. Keenan: That is all.

Cross-examination by Mr. Robb.

Q. Mr. Busch, how many officers came to your place of business to get uniforms? A. Well, we have quite a number of officers coming up to our place. I mean we were making army officers' uniforms.

Q. That is your regular business? A. Well, it was part of our business at the time.

Q. You mentioned Colonel Vidal, Colonel Jacobson? A. Yes.

Q. And who else, Lieutenant Roeser? A. That is right.

Q. They all got uniforms? A. That is right.

504 Q. They were all out there at Mitchel Field? A. Yes, they were at the time.

Q. Do you recall which one of those officers came in first? A. That would be pretty hard for me to say now. That is quite a number of years back now.

Q. You don't remember? A. I wouldn't remember.

Q. How about Captain Engelhardt? Did he come up, too? A. Yes, he was up for uniforms too.

Q. Were these officers, Vidal, Jacobson, Roeser, Engelhardt, Major Radovich, all in the same group, so to speak? A. Well, I mean, they were never always together.

Q. They were all friends, is that right? A. I imagine so.

Q. They appeared to be at least, is that right? A. (No answer.)

Mr. Keenan: I forgot to ask one question.

By Mr. Keenan.

Q. Was there some complaint about the fit of your uniforms? A. Yes, there was.

Q. Did some of them leave their uniforms back there because they didn't like the fit? A. That is right. 506

By Mr. Robb.

Q. Mr. Busch, do you recall which officer it was that brought his uniform back? A. Major Radovich and Lieutenant Roeser.

Q. They brought them back and left them with you, didn't they? A. That is right.

Mr. Robb: That is all.

Redirect examination by Mr. Wallace.

Q. Mr. Busch, you have discussed this matter with Mr. Levy, who sits at the counsel table here? A. That is right. 507

Q. How many times have you been to his office? A. Twice.

Mr. Wallace: That is all.

Mr. Robb: May I ask a question?

The Court: I would like for you to get through.

Mr. Robb: One question.

The Court: I will permit you now, but I want this case conducted in orderly fashion.

Mr. Robb: It was suggested by the last question of Mr. Wallace.

Recross-examination by Mr. Robb.

Q. Mr. Busch, did you ever see me before in your life? A. No, I didn't.

Mr. Robb: That is all. Thank you.

The Court: All right, sir, you may be excused. Is there any other witness you particularly wish to put
509 on this afternoon?

Mr. McGohey: If your Honor please, I was going to ask your indulgence. I am suffering from a cold in the throat now. The next witness will be a rather long witness.

The Court: Ladies and gentlemen, I am going to adjourn now until tomorrow morning. Bear in mind the admonition about not discussing the case.

Court is adjourned now until ten-thirty tomorrow morning. Be here promptly.

(Adjourned until Thursday, October 4, 1945, at 10:30 a. m.)

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510 New York, October 4, 1945, 10:30 a. m.

Trial resumed.

Mr. Ansell: If your Honor please, may we speak to you for a minute at the bench?

(Conference at the bench between court and counsel.)

The Court: Call the first witness.

MORRIS SAFFRON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Major, will you keep your voice up as high as you can, please, so that the last juror in the box will hear you clearly? A. I will, sir.

Q. You are a Major in the United States Army Medical Corps, are you not? A. Yes, sir.

Q. What is your present duty assignment? A. I am now on terminal leave, and I am assigned to the separation center at Fort Dix, New Jersey.

512

Q. Now, how long have you been in the United States Army, Major? A. Since 1931.

Q. In the year 1942, where were you assigned? A. 1942, I was assigned to the Army Building, 39 Whitehall Street.

Q. In New York City? A. In New York City.

Q. What was your duty assignment there? A. I was an examining officer.

Q. Will you explain that a little more fully? What were your duties as an examining officer? A. I was a senior examining officer. It was my duty to supervise medical examinations and give information concerning enlistments of applicants for enlistment.

Q. Do you know the defendant Samuel Bayer? A. Yes, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

513

Q. Will you indicate him to us? A. He is sitting right there (indicating).

Q. That is the gentleman in the brown suit? A. Yes, sir.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Is he the gentleman sitting here next to Sam Bayer? A. That is correct, sir.

Q. Do you know the defendant Radovich? A. No, sir.

Q. Were you ever stationed at Mitchel Field? A. Yes, sir.

Q. When were you stationed at Mitchel Field? A. 1939, for a period of six weeks.

Q. For six weeks in 1939? A. That is right.

Q. After you left at the end of that six weeks in 1939, were you ever again stationed at Mitchel Field? A. I was never actually stationed again at Mitchel Field.

Q. Now, when did you first meet Samuel Bayer? A. I met Samuel Bayer in the spring of 1942.

Q. Were you introduced to him by anybody? A. Yes, sir.

Q. By whom? A. I was introduced to him by Phil Busch.

515 Q. And, do you know, is Phil Busch connected with the I. Buss Uniform Company? A. Yes, sir.

Q. Now directing your attention to the early part of December, 1942, did you meet Samuel Bayer about that time? A. Yes, sir.

Q. And was he accompanied by anybody? A. Yes, sir.

Q. By whom? A. Joe Busch.

Q. Anybody else? A. They were alone.

Q. Where did you meet them? A. At the Governor Clinton Hotel.

Q. I am talking about December 1942. I beg your pardon. I met them at the Induction Center, Grand Central Palace.

Q. Let me ask you this: did you ever meet a man named Bob Bayer? A. Yes, sir.

516 Q. Did you ever meet a man named Melvin Usdan? A. I do not recall ever meeting him.

Q. Where did you meet Bob Bayer? A. At the Induction Center.

Q. Did you meet him at the same time that you met Busch and Sam Bayer? A. Yes, sir.

Q. At the Induction Center? A. Right.

Q. Did you have a conversation with them that day? A. I had a conversation with Mr. Busch that day.

Q. With Mr. Busch. Will you tell us what that was? Was Mr. Bayer there while the conversation was going on?
A. Yes, he was there.
Q. Will you tell us what that conversation was?

Mr. Keenan: I object to that.

The Court: It is understood that your objection carries through to all conversations at which all three defendants were not present.

Mr. Keenan: In addition to that, we think the time has arrived to respectfully request that orderly procedure be followed in the trial and at some time we learn what the Government claims the agreement was that is the basis of this conspiracy—how it was made 518 and by whom it was made.

It is perfectly true, your Honor, if you can indulge me just a moment, it is perfectly true that it is not possible to show a conspiracy in one sentence or by one witness, but it is impossible to write all of the incidents of the story of Oliver Twist, and we do have a right to have some logical order followed in the discretion of this court without it being abused, with great respect. And we think that to put on continuously, from one day to another, isolated instances without regard to time or without ever being informed from the witnesses what the agreement was that is the core of the conspiracy, is so confusing to the jury that it amounts to an abuse of the process, and we are lodging our ob- 519 jection seasonably upon that point now.

The Court: I see no objection to the way the case is being presented. Your objection will be overruled.

Mr. Robb: If the Court please, may we ask the Court at this time to tell the jury that none of these conversations which may have taken place out of the presence of our client, Major Radovich, may be used against him unless and until in some way they are tied

up with him at the proper time. Now this witness has testified he doesn't even know our client.

The Court: That is not conclusive.

Mr. Robb: No, sir. But, nevertheless, these conversations took place out of his presence in 1942, apparently before he even knew the Bayers, and we think it only fair that the jury should be told that they must not take these conversations, if they took place, against our client unless and until he is in some way connected with them.

The Court: I will make an explanation briefly to the jury. Ladies and gentlemen, the charge which you
521 are trying, as I indicated, to begin with, is that of conspiracy, the fundamental element of which is an agreement, a mutual understanding between people to do something. It is not necessary that that be a formal agreement. It is not necessary that it come into existence at one precise particular time. Now if and when the evidence satisfies you beyond a reasonable doubt that a conspiracy, mutual understanding, came into existence, then statements made by any one of the parties involved, whether in the presence of the others or not, in furtherance of the scheme, is admissible as evidence against all. Now unless and until you are satisfied beyond a reasonable doubt that a conspiracy came into existence, you should not consider the statements made by one party out of the presence of
522 the others as evidence against the other person who did not make the statement. I will be more full about that at a little later time in the trial. Go ahead.

Q. Will you tell us what the conversation was that you had with Philip Busch?

Mr. Robb: May I make one further suggestion in that respect, that statements made prior to the entry

into this agreement or conspiracy, if there was any, would not be admissible against someone who hadn't joined in the conspiracy at that time, unless in some way afterwards he ratified it.

The Court: I attempted to make that clear, and I think I have.

Mr. Robb: Yes, sir.

Mr. McGohey: I will withdraw that question.

Q. Now I direct your attention to the summer of 1943. Did you see Samuel Bayer some time in the month of July 1943? A. Yes, sir.

Q. Where did you see him? A. I met him at the Governor 524
Clinton Hotel.

Q. In New York City? A. Right.

Q. About what time of day was it? A. It was about seven o'clock in the evening.

Q. Was anybody with him when you met him? A. He was accompanied by Joe Busch.

Q. And prior to meeting him there that evening, had you received a telephone call from Joe Busch? A. Yes, sir.

Q. Will you tell us what Busch said to you?

Mr. Robb: We object.

The Court: Objection sustained.

Q. Well, you met him in the Governor Clinton Hotel? A. Yes, sir. 525

Q. Now will you tell us what happened there after you met him? A. When I arrived at the Governor Clinton Hotel, Mr. Bayer and Mr. Busch were in the lobby. We were awaiting—that is, I was awaiting the arrival of another officer. Prior to the arrival of this other officer, Mr. Bayer left the hotel. Upon the arrival of this other officer, Lieutenant Fabbricatore, Joe Busch, Lieutenant Fabbricatore and myself then went to the balcony of the hotel.

Q. And after you got there, without telling me any conversation at this point, did you and Lieutenant Fabbricatore have a conversation out of the hearing of Mr. Busch? A. Yes, sir.

Q. And then did you come back and join Busch? A. Yes, sir.

Q. And then, without telling me any conversation at that point, what did you do? A. At that point Lieutenant Fabbricatore and I left the hotel, for a short while, and then I returned——

Q. Pardon me for a minute. When you came down from the balcony, did Busch come down with you? A.
527 Yes, sir, he did.

Q. He came down to the lobby? A. That is right.

Q. And then, as I understand it, you and Lieutenant Fabbricatore left the hotel? A. And I arranged to return to the lobby of the hotel and meet Joe Busch there.

Q. Had you told Joe Busch that—to wait for you? A. That is right.

Q. Did you come back? A. I did.

Q. Did you meet Joe Busch? A. I did.

Q. Then what did you do? A. I met Joe Busch and Sam Bayer.

Q. And what did you do then? A. We entered a taxicab and drove around for about ten or fifteen minutes.

Q. In the taxicab was yourself, Joe Busch, and the defendant Samuel Bayer? A. That is correct.

528 Q. Did you have a conversation in the cab? A. Yes, sir.

Q. Will you tell us the substance of that conversation, what you said and what Bayer said and what Busch said? A. Sam Bayer said, "I would do anything in my power to keep my boy from going overseas."

Q. And what did you say to him? A. I said, "There is absolutely nothing that I can do for you. I have been given to understand that your boy's case is a celebrated matter

at Mitchel Field and is full of dynamite. I'll have absolutely nothing to do with it."

Q. Was there any mention in that conversation about rumors at Mitchel Field? A. Well, that is what I intended to convey by the statement I just made.

Q. I asked you, was there any mention of rumors at Mitchel Field in the conversation you had.

Mr. Keenan: I object to that, your Honor. I don't think the time has come where we are going to convict a man on rumors. I object to that question.

The Court: I think your comment is not entirely pertinent. This is a statement made to one of the defendants. I overrule the objection. 530

Mr. Keenan: Exception.

The Court: You may proceed. What did you say to him?

The Witness: "There have been rumors at Mitchel Field that this case is being tampered with."

Q. Did you state that to Sam Bayer? A. I did.

Q. What did Sam Bayer say? A. He made no statement concerning it.

Q. Did he deny the truth of any such rumors?

Mr. Keenan: I object to that. Just a moment. If your Honor please, I object, and at least I think this witness ought to be permitted to testify without words being put in his mouth by the United States Attorney. 531

The Court: Your objection is overruled.

Mr. Keenan: Exception.

Mr. McGohey: Will you read the question?

Q. (Question read.) A. He did not.

Q. Was there anything further said in the conversation? A. No, sir.

Q. Have you given us all the substance of that conversation? A. Yes, sir.

Q. Now, when you concluded this taxicab ride, that was in the neighborhood of the Governor Clinton Hotel, was it? A. That is correct.

Q. At the conclusion of the ride did you get out of the car? A. Yes, sir.

Q. Did you leave Sam Bayer? A. I did.

Q. And you also separated from Busch? A. A few minutes later I separated from Busch.

Mr. McGohey: I have no further questions, your
533 Honor.

The Court: Do you wish to cross-examine?

Cross-examination by Mr. Keenan.

Q. When you first met Mr. Bayer, was that at Grand Central Palace Induction Center? A. No, sir.

Q. Where was it? A. It was at a lunch room.

Q. A lunch room? A. That is right.

Q. At that time were you asked to do anything by Mr. Bayer? A. No, sir.

Q. The next time you saw him, was that at the Grand Central Induction Center? A. Yes, sir.

Q. Was that where young men went to offer themselves for enlistment in the Army? A. Yes, sir.

534 Q. You happen to know that that is what Martin Bayer was doing down there with his father? A. Yes, sir.

Q. He was going down there to voluntarily enlist in the service of the United States? A. That is correct.

Q. Do you know what his age was at that time? A. No, sir.

Q. Do you know approximately? A. No, sir.

Q. Can you give any estimate of it at all? A. I should say he may have been around twenty.

Q. At that time were you asked to do anything by Mr. Bayer, in any conversation you had with him at the Grand Central Palace? A. No, sir.

Q. At the time of the induction? A. No, sir, not at all.

Q. I just want you to tell the Court and jury if there was any improper approach of any kind that you can think of made to you at that time? A. None whatsoever.

Q. And the next time you saw Samuel Bayer was at the Governor Clinton Hotel? A. That is correct.

Q. And Joseph Busch, was it, made the appointment with you to come down there? A. That is right.

Q. Were you conspiring with anyone at that time? A. No. 536

Mr. McGohey: I object.

The Court: Objection sustained.

Q. Was anyone conspiring with you that you know of?

Mr. McGohey: I object.

The Court: Objection sustained. That is a legal term, Mr. Keenan.

Mr. Keenan: I have thought so, your Honor, but I don't know what the precise limitations are as set forth in this indictment.

Q. Doctor, you said that you told Mr. Bayer that his son's case was a celebrated case in substance, didn't you? 537 A. That is right.

Q. You made some investigation out at the field about it, didn't you? A. I did not.

Q. You talked to someone about it? A. That is right.

Q. Had you heard about it before you came down to the Governor Clinton Hotel that night? A. No, sir.

Q. So that all you learned about the case you learned from Lieutenant Fabbricatore? A. That is correct.

Q. Was he Lieutenant or Sergeant then? A. I believe he was then a lieutenant.

Q. He had been a sergeant previously; did you know that? A. Yes, sir.

Q. Did you leave Sam Bayer from the first time you met him in the evening when you met him at the Governor Clinton to go away and then come back and see him again? A. I didn't quite get the question.

Q. What I am trying to bring out is, when Samuel Bayer went to meet you on that day in July, as you best fix the time, of 1943, you spoke about some officer coming in? A. Officer.

539 Q. That was Lieutenant Fabbricatore? A. Right.

Q. What you learned about the Bayer matter out at Mitchel Field you learned that evening? A. Exactly.

Q. You knew nothing about it before? A. Right.

Q. And of course had nothing to do with it later, did you? A. Right.

Q. So whatever rumors you heard, or whatever you heard, you acquired that information that evening? A. Right.

Q. During the matter of what—an hour or two? A. Exactly.

Q. Did Samuel Bayer ask you to do anything improper that you know of in that evening?

Mr. McGohey: I object to that—"improper"—your

540 Honor.

The Court: I am going to overrule the objection.

The Witness: Will you repeat that question?

Q. Yes, I will repeat it, and I am making it very broad purposely. Did Samuel Bayer ask you that evening, yourself, to do anything improper? A. No, sir.

Q. Did you ever have any conversations with Elias Bayer at all about this matter in any manner, shape or fashion? A. No, sir.

Q. Did you know him well or— A. Very casually. I met him once.

Q. Whatever there was to this business about the boy, you never had any relation—no questions were asked or no conversations with Elias Bayer at all? A. That is correct.

Q. Do you know where Martin Bayer, the son of Samuel Bayer, was at that time, in July, whether he was at Mitchel Field or Westover Field? A. I do not.

Q. Specifically, do you know whether he had been transferred at the time? A. I believe that he was not at Mitchel Field.

Q. That is your best recollection? A. That is correct. 542

Q. So that if he were transferred from Mitchel Field to Westover or Bradley Field, he would be at either one of those two places, as you best recall, at the time of this conversation in July? A. I do not understand the question.

Q. Well, assuming that Martin Bayer when he left Mitchel Field or was transferred from Mitchel Field, went over to Westover Field or Bradley Field, he would have been at either one of those fields, as far as you know? A. Well, if he had been transferred to one of those two fields, he would have been there.

Q. Your best recollection is that he had been transferred at the time of this conversation? A. I believe so.

Q. And Mr. Bayer was quite agitated, was he, Samuel Bayer? A. He certainly was.

Q. He seemed frightened? A. Certainly. 543

Q. And was he concerned about his son? A. Very much so.

Q. Did he tell you why? A. Yes, he did.

Q. Would you give us his reasons, what he said to you about that? A. He thought that his son was to be sent overseas.

Q. Yes? Did he tell you what unit he was in? A. No, sir.

Q. Did he tell you that he was suddenly transferred from a clerk's position to the airborne engineers? A. He did not. He merely said that his son was in an outfit that was being shipped overseas immediately.

Q. And that he was quite frightened about it? A. He was very much perturbed.

Q. You are a doctor? A. That is right.

Q. Would you say that he was in an agitated mental condition, too? A. I certainly would.

Q. You weren't offered any money of any kind, were you? A. No, sir.

Q. Well, I know that you indignantly reject the sug-
545 gestion, but I am saying no one offered it to you? A. That is correct.

Q. Or anything else of value? A. No, sir.

Cross-examination by Mr. Robb.

Q. You never saw the defendant Radovich, did you, until after this case started? A. I never saw him until the case started.

Q. Now, Major, you didn't think that there was anything wrong about a parent being concerned about his son's assignment, did you? There wasn't anything wrong about it? A. No.

Mr. McGohey: I object to that, your Honor.
546 The Court: Objection sustained.
Mr. Robb: I think that is all.
The Court: Redirect?
Mr. McGohey: I have some further questions.
The Court: All right.

Redirect examination by Mr. McGohey.

Q. In answer to Mr. Keenan's question, you said that prior to this conversation that you had at the Induction

Center, you had a previous conversation down at a lunch room or a restaurant? A. That is right.

Q. Can you fix the time of that? A. Yes, sir. That was early in 1942.

Q. Early in 1942? A. When I first met Mr. Bayer.

Q. You had a conversation at that time? A. That is correct.

Q. Now tell us what that conversation was. A. At that time——

Mr. Keenan: I think your Honor has ruled that out to the knowledge of the District Attorney before, that same type of question. If there is any reason why that is not objectionable under the law, the same as other conversations prior to the date of this alleged conspiracy, I would like to know, otherwise I want to renew my objection. 548

The Court: I am inclined to sustain the objection.

Mr. McGohey: If your Honor please, I hadn't gone into that conversation. I understood that counsel for the defendants had.

The Court: I don't think so. As to why he first met him, he said he met him at the lunch room.

Mr. McGohey: Your Honor, I respectfully submit that it was opened up by the question: Was there anything improper in that conversation?

Mr. Keenan: I will withdraw the objection.

Mr. McGohey: The question was, was there anything improper in the conversation. 549

The Court: I understood that to refer to the Governor Clinton conversation.

Mr. McGohey: Well, I will accept your Honor's recollection. Do I understand that the objection is withdrawn?

Mr. Keenan: Yes. I withdraw the objection. Let him tell about any conversation he had with him.

Q. What was that conversation, Major, the conversation in the restaurant in the early part of 1942? A. When I first met Mr. Bayer. Well, I first met Mr. Bayer at a lunchroom in the early part of 1942 at the suggestion of Mr. Phil Busch, from whose organization I had previously purchased several uniforms.

Q. Will you tell us what the conversation was? A. That is right. The conversation in substance was this: Mr. Bayer was worried about the fact that his son was shortly to be drafted and that he feared he would be assigned to an infantry outfit, a combat unit, and he wanted to know whether the boy could voluntarily enlist prior to his induc-
551 tion into the service, and I gave him the information, which was available to everyone at that time, to the effect that if the boy voluntarily enlisted prior to his induction he could select whatever branch of the service he was interested in. That was the substance of the conversation at that table.

Q. Now coming down to the meeting that you had with him at the induction center——

Mr. Robb: May I interpose here for just a moment. That conversation, as I understand it, took place before the date alleged in the indictment of the starting of this conspiracy. We therefore request your Honor to tell the jury that that does not bind the defendant Radovich and it cannot bind him.

The Court: All right. I will direct you not to con-
552 sider that in your consideration of the case of the defendant Radovich, that is, the conversation just related.

Go ahead.

Q. Coming down to the meeting that you had with him at the induction center, just prior to that meeting at the induction center had you met Samuel Bayer shortly before that? A. You mean at the end of 1942, the latter part of 1942?

Q. Yes. A. I believe I was called by Mr. Busch again, but I did not meet him until the time that his son was actually again enlisted—the second son.

Q. Have you told us the full conversation that you had with Samuel Bayer and Busch at the induction center? A. I have, sir.

Mr. McGohey: I have no further questions, your Honor.

The Court: Any further questions?

Mr. Keenan: I would like to ask a question.

Recross-examination by Mr. Keenan. 554

Q. How many times have you been down to the United States Attorney's office? A. Three times.

Q. And did you discuss the matter with our representatives of the Government in preparation for your attendance here? A. No, sir.

Q. With any members of the Federal Bureau of Investigation? A. Oh, yes.

Q. How many times? A. Twice.

Mr. Keenan: That is all.

The Court: All right. Call the next witness.

Mr. McGohey: Pardon me. Your Honor ruled at the beginning of the trial that I could only have one representative of the F.B.I. with me during the trial. 555 I asked at that time that Mr. Flynn, who was in charge of the investigation, be here. Now in connection with the next witness, however, I may have to go into some matters of accounts, and the work on that phase of the case was done by another agent. I might want to call him in.

The Court: Will that other agent testify?

Mr. McGohey: Yes, your Honor, he might.

Mr. Keenan: We have no objection, your Honor, to his presence.

The Court: All right.

HAROLD BUSCH, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Mr. Busch, what is your business? A. Uniforms.

Q. What is the name of your company? A. I. Buss
557 Uniform Company.

Q. Will you keep your voice up, please, so that the last juror here can hear you. A. I. Buss Uniform Company.

Mr. Ansell: I hope the United States Attorney will amend that so that the last counsel can hear.

Mr. McGohey: Very well.

Q. I will ask you to keep your voice loud enough so that the last juror and the last person in the room can hear you. A. I. Buss Uniform Company.

Q. You know the defendant Samuel Bayer, do you not? A. Yes, sir.

Q. Do you know the defendant Elias Bayer? A. Yes, sir.

Q. Are you related to Samuel Bayer? A. Yes, sir.
558

Q. What is the relationship? A. Brother-in-law.

Q. Your sister is married to Samuel Bayer? A. That is right.

Q. Do you know the relationship between Samuel Bayer and Elias Bayer? A. Yes, sir.

Q. They are brothers, are they not? A. That is right.

Q. Do you know the defendant Radovich? A. Yes, I do.

Q. Would you keep your voice up, please. Now, do you know an officer in the United States Army, named Colonel Vidal? A. Yes.

Q. Do you know an officer named Lieutenant-Colonel Jacobson? A. Yes.

Q. Do you know a Lieutenant Roeser? A. Yes.

Q. Do you know a Captain Engelhardt? A. Yes.

Q. Do you know where those men were stationed in the spring of 1943? A. I believe at Mitchel Field.

Q. Where did you meet these various officers? A. I met them at my place.

Q. At your place of business? A. At my place of business, that is right. 560

Q. Were you introduced to them by anybody? A. Yes.

Q. By whom? A. By Elias Bayer.

Q. Did Elias Bayer bring them to your place of business? A. He just brought Radovich.

Q. Now at the time that Elias Bayer brought Radovich to your place of business, did you have a conversation with him? A. With Elias Bayer?

Q. With Elias Bayer. A. To what extent?

Q. Well, to any extent. A. Well, I may have had a conversation with him.

Q. Well, did you? A. Yes; to make him a uniform.

Q. Will you tell us what the conversation was? A. To make him a uniform.

Q. Would you keep your voice up, please. A. To make him a uniform. 561

Q. To make whom a uniform? A. Radovich.

Q. The defendant in this case? A. Yes, sir.

Q. The man sitting over at the other end of the table? A. That is right.

Q. Now in that conversation was the question of payment mentioned? A. Well, no question of payment was mentioned, but it was understood that if——

Mr. Robb: Just a moment, we object to that.

The Court: I have to sustain the objection as to the understanding. What was said in that connection, what was said by anybody?

The Witness: That they will pay for the uniforms.

Q. Who said that? A. Elias Bayer.

Q. Said that he would pay for the uniforms? A. That Radovich would pay for the uniforms.

Q. That Radovich would pay for it? A. That is right.

Q. Did you subsequently make a uniform for Major Radovich? A. Yes, sir, we did.

563 Q. Did you make one for Colonel Vidal? A. Yes, we did.

Q. Did you make one or more for Jacobson? A. Yes, we did.

Q. And for Roeser? A. Yes.

Q. Were you paid for those uniforms? A. Yes, we were.

Q. Who paid for them? A. Plymouth paid for them.

Q. Plymouth? A. Plymouth Thread.

Q. Now, do you know who owns the Plymouth Thread? A. Samuel Bayer.

Q. You never received payment for those uniforms from any of the officers? A. No.

Q. You never received payment for the uniform from the defendant Radovich, did you? A. No.

Q. That payment you received from the— A. Plymouth
564 Thread.

Q. Plymouth Thread. That was some time in the spring of 1943? A. That is right.

Q. Now I direct your attention to the latter part of the summer of 1944. Did you in the latter part of August, or latter part of July or August of 1944, have a conversation with Samuel Bayer concerning the payment for these uniforms? A. In the latter part of 1944?

Q. Yes, in the summer of 1944. A. In the summer of 1944? Well, the uniforms were paid for around that time.

Q. No. I say, did you have a conversation with Samuel Bayer in the summer of 1944? A. Before the uniforms were paid for?

Q. Well, when were the uniforms paid for? A. I think the uniforms were paid for in June.

Q. Of '43? A. Of '43, that is right.

Q. I am talking about the following year. A. Oh, the following year, 1944.

Q. 1944. Did you then have a conversation with Samuel Bayer? A. Yes; he came into my place.

Q. Did the conversation relate to the payment previously made for those uniforms? A. Yes. 566

Q. Tell us what that conversation was?

Mr. Robb: If the Court please, this conversation obviously took place after the defendant Radovich had been arrested by the military authorities. We request the Court to instruct the jury that this conversation cannot be considered by them as against the defendant Radovich.

The Court: What have you to say to that?

Mr. McGohey: There isn't any evidence here as to when the defendant Radovich was arrested by the military authorities.

The Court: That would not necessarily be a termination of the conspiracy. 567

Mr. McGohey: Precisely.

The Court: Overruled.

Mr. McGohey: There is no evidence of the abandonment of the conspiracy.

The Court: All right; overruled.

Mr. Robb: May I have an exception.

The Court: Yes.

Mr. Keenan: Exception.

The Court: Very well. Go ahead.

Q. What was that conversation that you had with Sam Bayer in August, or the summer time, of 1944? A. In the summer time of 1944?

Q. Yes. A. The conversation I had with Mr. Bayer?

Q. Yes. A. How the uniforms—about the uniforms being paid for?

Q. Yes. Will you tell us what the conversation was? A. He asked me how I had it entered.

Q. Will you please keep your voice up so that everybody back here can hear you, Mr. Busch? A. He asked me how I had it entered, how the uniforms were paid for. So I told him that it was entered that the Plymouth paid for

569 these uniforms.

Q. In other words, your books showed that the payments for these uniforms which were made for the officers, your books showed that they had been paid for by the Plymouth Thread Company, is that right? A. That is right.

Q. What, if anything, did Samuel Bayer say to you then? A. He said I shouldn't have done it that way, that it should have been billed to look that the uniforms should have been paid for by the men themselves.

Q. Did he ask you anything else? A. Yes, he asked me to make the change.

Q. You mean make changes in your books of account? A. Yes, that is right.

Q. Did you make changes in your books of account? A.

570 I did.

Q. Was anybody with you while you were making those changes? A. No.

Q. Was Sam Bayer with you? A. Yes.

Q. While you made these changes? A. Yes, sir.

Q. Who does the bookkeeping for your company? A. I do.

Q. Is that book you have before you a book which you keep in the regular course of your business? A. That is right.

Q. What is it? A. This here is a ledger.

Q. This is a ledger. Directing your attention particularly to this page, did you make the entries on that page? A. Yes, I did.

Q. And you made them in the regular course of your business, is that correct? A. That is right.

Mr. McGohey: Now I offer the book in evidence, your Honor.

Mr. Keenan: Objected to.

Mr. Robb: May we see it?

Mr. McGohey: I am offering only that page at this time.

572

The Court: You said you offered the book.

Mr. McGohey: I withdraw that. I intend to offer only the page that I showed to the witness.

Mr. Keenan: The record ought to show what page it is.

Mr. McGohey: The page entitled, "Mitchel Field, New York, U. S. Army."

Mr. Keenan: "Mitchel Field, New York, United States Army."

Mr. McGohey: That is right. That is the page.

The Court: Is there objection, gentlemen?

Mr. Keenan: Yes, your Honor. We object to this. We understand that the Government is offering it on the theory that it was part of the conspiracy to conceal, and your making the suggestion that not necessarily would the conspiracy terminate with the departure of Major Radovich for the war in the Pacific on November 5th, 1943, we think, your Honor, with great respect, that it indulges in flights of fancy in the ridiculous assumption that there would be a continuing conspiracy to which Major Radovich would take part when he was at the same time thousands of miles away from the scene, in the United States Army,

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engaged in war. In other words, we think that there is entitled to be some sense to the allegation of the terms or agreement of the conspiracy. And we are alleging that we are objecting on that ground.

The Court: Rather strenuously, I would say.

Mr. Robb: We object also, if the Court please, on the ground that these acts and conversations took place after any conspiracy which may have ever existed even which could be alleged to exist had terminated. We think that should not be admitted against the defendant Radovich for that reason.

The Court: Objections overruled. The page may
575 be received.

Mr. Robb: Exception.

The Court: It is not necessary to physically detach it at this time. Just mark it. It may be physically detached and filed later.

(Government's Exhibit 5 received in evidence.)

Q. I ask you to look at Government's Exhibit 5 and tell the Court and jury whether you made a change on that page? A. Yes, right here (indicating).

Q. Mr. Busch, you must understand that your voice must be loud enough so that all counsel and the members of the jury can hear it. Will you please do that. A. Yes. Right here (indicating).

Q. Are you indicating the word— A. "May".

576 Q. May 10? A. That is right.

Q. Can you tell from looking at that page what was on there before you made the change? A. June.

Q. June what? A. Eleventh.

Q. June 11th.

Mr. McGohey: May I show this to the jury at this time, if your Honor please.

The Court: Yes.

(Government's Exhibit 5 shown to the jury.)

The Court: All right, go ahead.

Q. Now are the entries that appear on page 74 of this book in your handwriting, Mr. Busch? A. Yes.

Q. Is that a book that is kept in the regular course of your business? A. Yes.

Q. Is that a book in which you enter the receipts of each which come into your company each day? A. That is right.

Mr. McGohey: I offer page 74 of this book in evidence.

Mr. Robb: We make the same objection, your Honor. 578

The Court: I hope the objection will be in more temperate language.

Mr. Robb: I hadn't thought I was being intemperate, if the Court please.

The Court: Quite so.

Mr. Robb: Very earnest, though.

The Court: Objection overruled. Exception may be noted.

Mr. Keenan: We have the same objection, your Honor.

(Government's Exhibit 6 received in evidence.)

Q. I call your attention to the tenth line from the top, that is, the tenth item of entry from the top, and ask you if 579 you made any changes on the tenth line of that book? A. Yes. This one (indicating), and this one (indicating).

Q. You made a change of a figure appearing in the column headed "Net Cash," did you? A. That is right.

Q. And then immediately below that in the same column did you make another change? A. Yes.

Q. Then moving over to the right, on the tenth line did you make a change? A. Yes.

Q. Under the column headed "Accounts Receivable"? A. Yes.

Q. And likewise on the eleventh line in that same column? A. Yes.

Mr. McGohey: May I show this to the jury, if your Honor please.

The Court: Yes.

(Mr. McGohey shows Exhibit 6 to the jury.)

Q. I call your attention particularly to the last item on this page in this book bearing the red numerals 5512, and ask you if the entry there is made in your handwriting?

581 A. Yes.

Q. Tell me, what is this book? A. That is a bill book.

Q. Is it a book that you keep in the regular course of your business? A. Yes.

Q. Do you enter in there all of the— A. Merchandise that is billed out.

Q. That is billed out? A. That is right.

Q. This page here represents a carbon copy? A. That is right.

Q. The book itself then is a regular record kept in the regular course of your business? A. That is right.

Q. I call your attention to the item red numeral 5580 and ask you if that entry was made by you? A. Yes.

Q. It is your own handwriting? A. Yes.

582 Q. In the regular course of your business? A. Yes.

Q. Then item 5604, is that made by you? A. Yes.

Q. It is your handwriting? A. Yes.

Q. It is a record kept in the regular course of your business? A. Yes.

Mr. McGohey: Now, if your Honor please, I would like to offer the entries appearing as items 5512, 5580 and 5604 from this book in evidence.

Mr. Robb: We make the same objection.

Mr. Keenan: I have never seen the book. I would like to see it. We object to that on the same theory, your Honor.

The Court: Objections overruled.

Mr. Robb: The same objection for the defendant Radovich. Exception.

(Government's Exhibit 7 received in evidence.)

Q. Mr. Busch, I call your attention to the item 5512. Did you make changes in that? A. Yes.

Q. Was Samuel Bayer present with you while you did it? A. Yes. 584

Q. By the way, was Samuel Bayer present while you made the other changes that you just testified to? A. Yes.

Q. And this 5580, did you make changes there? A. Yes.

Q. And Samuel Bayer was present with you? A. Yes.

Q. And 5604? A. Yes.

Q. You made a change there? A. Yes.

Mr. McGohey: May I show these to the jury, your Honor?

The Court: Yes.

(Mr. McGohey shows exhibit to jury.)

Q. Mr. Busch, have you from time to time received loans of money from Samuel Bayer? A. He endorsed notes for us. 585

Q. Will you keep your voice up? A. He just endorsed notes for us.

Q. To that extent he loaned you his credit, did he not? A. Well, to an extent, yes.

Q. Yes. And he has done that on several occasions, has he not? A. Yes.

Q. You are friendly with Samuel Bayer, are you not? A. Yes.

Q. You have no ill will against him? A. No, sir.

Q. Now at the time Sam Bayer came up and asked you to make these changes to which you have testified— A. Yes.

Q. In the conversation that you had was the word "investigation" mentioned? A. No.

Q. Was there any discussion about any investigation? A. No, sir.

Q. By the Army? A. No, sir.

Q. By anybody? A. No, sir.

Q. Are you sure of that? A. I am sure of that.

Q. Did Sam Bayer say to you why he wanted to make these changes? A. Why he wanted to make those changes,
587 he felt the way I had it, showing that the Plymouth paid for it, he didn't want it to show that way, and he wanted it to show that the officers had paid for it themselves.

Q. Did he say why he wanted that change made? A. Why?

Q. Yes. A. Well, he never mentioned it to me why, but he just asked me to do him that favor.

Q. He didn't give you any reason? A. No, sir.

Q. How long did it take you that day to make those changes? A. Probably about an hour and a half, two hours.

Q. By the way, what time of day was it? A. I believe it was in the afternoon.

Mr. McGohey: I have no further questions.

588 *Cross-examination by Mr. Keenan.*

Q. Mr. Busch, how large an establishment have you? A. It is not a large establishment.

Q. How many brothers have you? A. Two brothers besides myself.

Q. You all work there? A. Yes, sir.

Q. How many employees have you, approximately? A. We only have—normally we have one; during the season we have two.

Q. You didn't have any large Fifth Avenue tailor establishment, did you? A. No, sir.

Q. And I assume since Mr. McGohey has mentioned something about notes, credit, that would indicate that you were working on a pretty close margin of credit? A. That is right.

Q. And you had to watch every dollar, is that correct? A. That is right.

Q. When Elias Bayer brought these officers in, there was nothing secret about that, was there? A. No, sir.

Q. They came in like anyone else would come in? A. That is right.

Q. They didn't wear any masks or any instrumentalities of hiding? A. No, sir. 590

Mr. McGohey: I object to that.

Mr. Keenan: Well, I will not elaborate on it.

Q. Did they come in the daytime or the nighttime, as you recall? A. During the day.

Q. And as far as you know, they all wore uniforms showing themselves to be officers in the United States Army? A. That is right.

Q. There was nothing hidden about the proceeding at all, was there? A. No, sir.

Q. And I believe you answered the District Attorney that when Radovich came in with Elias Bayer, Elias Bayer told you that Radovich would pay for the uniform? A. 591 That is right.

Q. Now, by the way, I imagine you have made a few appearances down to the District Attorney's office haven't you? A. That is right.

Q. How many, about? A. Oh, I would say about three.

Q. Were they lengthy? A. Well, the first day I was brought down, the first time I was held for ten and a half hours.

Q. You were? A. Yes, sir.

Q. Who brought you down? A. Two agents, two F.B.I. men.

Q. You were here on other occasions besides that ten and a half hour conference? A. Yes, sir.

Q. Was Mr. Wallace, the young able assistant to Mr. McGohey, there on occasions? A. Well, I saw Mr. Wallace down there without Mr. McGohey and then I saw Mr. McGohey I think twice.

Q. And they asked you about these matters that you testified to? A. That is right.

Q. Did you bring your books with you? A. No, my books
593 were brought down the first time I was called down by the F.B.I. men.

Q. They were in the condition they exist now when they were brought down, is that right? A. Yes, sir.

Q. But, in any event, when Major Radovich—or I believe he was Captain Radovich then, wasn't he? A. That is right.

Q. When he came in with Elias Bayer, Elias told you to measure him for a uniform and that Radovich would pay for it? A. That is right.

Q. Did Radovich voice any objection to that, or did he say anything then? A. No, there was no question on that.

Q. And, by the way, we haven't got a statement of what those uniforms cost in the aggregate. I would like to refer to that for a moment. About how much did the uniforms
594 cost? A. I think one was $35 and some was $45. The summer was $35 and the winter uniform was $45.

Q. Made to order? A. That is right.

Q. Gabardine? A. The summer was gabardine and the winter was regular elastique.

Q. Did you make a lot of uniforms for officers? A. Yes, we did.

Q. Was that a big part of your little business? A. It wasn't a big part, but it was a part of it.

Q. How long do you usually wait before you get paid for your merchandise, when you measure them up and sell them? A. We usually get paid right away.

Q. You have to, don't you, to keep in business? A. That is right.

Q. With the size of business you do? A. That is right.

Q. So that when you didn't get your money from Radovich, what did you do about it? A. I immediately got in touch with the Plymouth Thread and asked them to pay for them.

Q. Why? A. Because I needed money to conduct my business.

Q That is, as I understand it, neither Sam nor Elias 596
came to you and said they would pay you for the uniforms, you asked them to pay for them since they brought these officers there? A. Since they brought these men there I asked Plymouth to pay for them, yes.

Q. As you couldn't conduct your business without being paid reasonably promptly? A. That is right.

Q. And you weren't paid, so therefore you made a mild complaint about it and asked them to get the money? A. That is right.

Q. You had a little trouble in the fitting, Mr. Busch? A. Well, we did have trouble I think with Major Radovich's uniforms.

Q. As I understand, you of course naturally had some trouble in the fitting of these uniforms to these officers, some of the others were dissatisfied with them besides 597
Major Radovich, weren't they? A. I don't know. I know Radovich did bring his uniforms back.

Q. Oh, he didn't keep them? A. No, sir.

Q. Was that one of the reasons why he refused to pay you for them? A. I don't think so, because we were paid for it before he brought them back.

Q. Oh, you were paid for them before they were brought back? A. That is right.

Q. How long did he keep them before he brought them back? A. Quite a few weeks.

Q. Quite a few weeks. By the way, how long did you wait before you called Sam Bayer to see why the bill wasn't paid? A. I called him within about a week.

Q. About a week. A. Ten days.

Q. Are you in the habit of sending bills out? A. Yes.

Q. Do you recall whether or not you sent any bills? A. Bills were given to them, they were made out to them.

Q. Made out to them? A. Yes.

Q. Did you hand them to them? A. They were given in each package.

599 Q. So when you delivered the uniform to the officer you send out a bill and you charged such officer? A. That is right.

Q. You entered right in your books that you were making the uniforms for the various officers at exactly the fixed price at which you were charging, is that right? A. They were wholesale prices.

Q. Oh, wholesale price? A. Yes.

Q. I didn't know that. So these officers did get the wholesale figure? A. They did.

Q. And I assume that was due to the fact that your brother-in-law brought them in that you gave them a concession? A. That is right.

Q. Did you ever do that with anybody else, give wholesale prices? A. No, not unless they are recommended.

600 Q. Ah, not unless they are recommended. But I suppose there are quite a few people recommended from time to time who get the lower price? A. That is right.

Q. What happened to the Radovich uniform ultimately, or finally? A. The Radovich uniform, I mean his size was very hard to get rid of; we practically peddled it out in pieces, wherever we can get a few dollars for it.

Q. Anyway, Major Radovich didn't keep it? A. No, he did not.

Q. Did Colonel Vidal complain about the fit, so far as you know? A. Not that I know of.

Q. Did Colonel Jacobson? A. Not that I know of.

Q. Are there people that charge more than your price for officers' uniforms? A. Yes, there are.

Q. I suppose there are different grade establishments? A. No. They don't come recommended for a wholesale price. It is more or less of a favor.

Q. I am getting at something different. Do they have many tailors that fit uniforms for officers the way they do for civilians, so that some tailors charge more than others? A. Yes, there are.

Q. And some do a little finer work? A. That is right. 602

Q. Would you class yourself as medium priced? A. Medium price.

Q. Anyone could see, of course, who these uniforms were for at all times, and what the prices of them were? A. Yes, sir.

Mr. Keenan: That is all.

The Court: Have you any questions, Mr. Robb?

Mr. Robb: No, sir, I have no questions.

The Court: Any further questions, Mr. McGohey?

Mr. McGohey: Yes, your Honor, just a few more.

Redirect examination by Mr. McGohey.

Q. Can you tell from looking at this book before you, 603 whether or not the uniforms you made for these officers, Jacobson, Vidal, Roeser, Radovich, Engelhardt, were delivered to those men personally? A. Yes; at our place.

Q. Each one of these men came in and picked up his uniform? A. That is right.

Q. And at the time he received his uniform did he receive a bill? A. Yes; it was in the package.

Q. Did you tell him that he had a bill there? A. No, I didn't tell him he had a bill there.

Q. You just put it in the package? A. That is right.

Q. Did you ask them at that time for the payment of any uniforms that they were taking out? A. No, we did not.

Q. Do you usually do that with customers? A. Yes, we do, because we were recommended by them anyway, so—we were recommended by these officers to us, so we didn't ask them for the money. I figured they would pay us in a few days anyway.

Q. No. The question I asked is, is it your practice to deliver merchandise at your place without receiving cash for it? A. Yes, at times.

Q. Do you do that to people who have not previously established lines of credit with you? A. No, sir.

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Q. You had never met any of these officers prior to the time they came in and ordered their uniforms, had you? A. No.

Q. So that as far as each one of them individually was concerned, he had no established line of credit with your company, did he? A. No, but they had come recommended.

Q. By Elias Bayer? A. By Elias Bayer.

Q. Now at any time after you delivered uniforms to them, did you—you knew where they were stationed, did you not? A. I knew where they were, but I didn't know exactly what position they were in.

Q. You knew they were at Mitchel Field, did you not? A. I did, yes.

Q. Did you ever call them up on the telephone— A. No.

606

Q. —and ask them to pay for their uniforms? A. No.

Q. Did you ever write to them and ask them to pay for their uniforms? A. No.

Q. Did you ever call on anybody and ask them for the payment of those uniforms except the Bayers? A. That is right.

Q. Going back to the first time that Elias Bayer introduced you to Major Radovich, then Captain Radovich, I

think you testified that he asked you to measure him up for a uniform? A. That is right.

Q. I ask you again, was there any conversation at that time about payment for that uniform?

Mr. Keenan: I object.

Mr. Robb: I object to that.

Mr. Keenan: It has already been gone into.

The Court: I overrule the objection.

Mr. Keenan: Exception.

Mr. McGohey: Will you read the question?

Q. (Question read.) A. Well, yes, that Radovich would pay for the uniform. 608

Q. That Radovich would pay for the uniform? A. That is right.

Q. Is that your best recollection of that? A. That is right.

Q. Did you testify in the grand jury——

Mr. Robb: We object to this.

Q. In this investigation?

Mr. Robb: We object to this.

The Court: Let me see what you want to examine him on.

(Mr. McGohey approached the bench.) 609

Mr. Keenan: May I ask if the United States Attorney is claiming surprise at this time and attempting to impeach this witness, your Honor?

The Court: I am going to sustain the objection.

Mr. McGohey: I will withdraw the question, your Honor. I have no further questions.

The Court: Any further questions, gentlemen?

610 *Harold Busch—For Government—Recross.*

Recross-examination by Mr. Keenan.

Q. By the way, I don't believe I have ever seen you before today? A. No, sir.

Q. Or ever talked with you before you got on the witness stand? A. No, sir.

Q. When these officers came in and you saw a man wearing the insignia of a Colonel in the Army, you rather suspected he would pay for his uniform? A. That is right.

Mr. McGohey: I object to that.

Q. Didn't you? A. That is right.

611

The Court: I am going to allow the question.

Q. The district attorney asked you about whether you called on these officers to pay for the uniforms. Wouldn't you say there was a slight hint that you expected them to pay for uniforms when you sent a bill out with the goods? A. I would expect to get paid for them, but after a few days they didn't pay me for them.

Q. But when you sent a bill out to them with the goods, directed to them, that was rather a hint that you expected to get your money? A. That is right.

Q. Perhaps a broad hint? A. That is right.

612 Mr. Keenan: That is all.

By Mr. Robb,

Q. Mr. Busch, you also had some trouble with Captain Engelhardt about his uniform? A. He never took his uniforms. There is a credit bill issued in the book for it.

Q. He never took those either? A. No, sir.

Q. I believe the other day Colonel Vidal testified that his didn't fit. You had trouble with him about that? A. Yes, but we made him a new one.

Mr. Robb: That is all.

Mr. McGohey: Could I ask one question, if your Honor please.

Redirect examination by Mr. McGohey.

Q. Since the first time that you have been down here in this building, have you talked to any of the attorneys for the defendants? A. The only one I spoke to was Mr. Levy. 614

Q. Mr. Levy? A. That is right.

Q. That is the gentleman sitting over here? A. Yes.

Q. You talked to him about this case? A. Yes, sir.

Q. You talked to him about what you have been asked up here, did you not? A. Yes.

Mr. McGohey: All right.

The Court: All right, stand aside. The court will take a ten-minute recess.

(Short recess.)

JOHN K. PEPPER, called as a witness on behalf of the Government, being first duly sworn, testified as follows: 615

Direct examination by Mr. McGohey.

Q. Captain, you are an officer in the United States Army, are you not? A. Yes, sir.

Q. What is your present assignment? A. I am presently acting personnel officer of Headquarters, First Air Force.

Q. Where are you stationed? A. Mitchel Field, New York.

Q. How long have you been at Mitchel Field? A. I arrived at Mitchel Field on or about August 2nd, 1942.

Q. What was your rank at that time? A. Second Lieutenant.

Q. Keep your voice up, please, Captain, so that everybody at the counsel table and the last juror can hear you. A. Yes, sir.

Q. Thank you. You say you were a Second Lieutenant? A. That is right, sir.

Q. How long have you been in the Army altogether? A.
617 I was inducted into the Army on June 6th, 1941.

Q. Where? A. At New Cumberland, Pennsylvania.

Q. Thereafter did you go to Officers' Training School? A. I did.

Q. Do you know the defendant Radovich? A. I do.

Q. Do you know the defendants Bayer? A. I do not.

Q. Either one of the Bayers? A. I do not.

Q. Where did you first meet Captain Radovich? A. At Headquarters, First Fighter Command, Mitchel Field.

Q. Now directing your attention to the spring of 1943, do you know what Captain Radovich's rank and duty assignment was at that time? A. He was a Captain. He was a squadron commander of headquarters, Headquarters Squadron, First Fighter Command.

Q. What was your duty assignment at that time? A. I
618 was classification officer, First Fighter Command.

Q. So you and Captain Radovich were in the same organization? A. Same organization.

Q. In that organization at that time was there an enlisted man named Martin Bayer? A. During the summer of 1943 there was.

Q. Was there an enlisted man by the name of Melvin Usdan there at that time? A. There was.

Q. You said they were there in the summer of 1943. Do you know whether they were there in the spring of 1943? A. I am not certain.

Q. Well, at any rate, they were in the Headquarters Squadron in the summer of 1943? A. In the early summer of 1943.

Q. At any time in the summer of 1943 did you have a conversation with Major Radovich concerning these two enlisted men? A. I did.

Q. Will you tell us where that conversation was held? A. In the lower hallway of the Headquarters building.

Q. At Mitchel Field? A. At Mitchel Field.

Q. When you say the Headquarters building, you mean the building which houses the Headquarters of the First Fighter Command? 620 A. That is right, sir.

Q. That is the building where you did your work, is that it? A. That is right, sir.

Q. Will you tell us what captain, he was then captain, was he not? A. He was.

Q. Will you tell us what Captain Radovich said and you said?

Mr. Keenan: I object to the conversation.

The Court: Overruled. Go ahead, Captain.

A. We had just a general conversation. Some time during the conversation the men—the names of the two men came up—this man Bayer. I told Captain Radovich of the 621 rumors which were rampant at Mitchel Field at that time concerning the two men, those rumors being——

Mr. Keenan: I object.

The Court: I don't know what the rumors were, Captain, but I do want you to tell the Court and jury what you told Captain Radovich; just what you told him in the conversation.

Q. Tell us what you said to Captain Radovich? A. I told him I had been——

Mr. Keenan: Objection.

The Court: Objection overruled. Go ahead.

A. (Continuing) Told that there was a remarkable similarity in uniforms worn by different people on the base, and that people in the home districts where the men lived were also complaining about the fact that they had spent so much time at home, which was unusual for low ranking men—it is usually restricted to the first three grades. I also repeated to him the fact that they appeared to have
623 claimed that they were established at Mitchel Field. Major, Captain Radovich at the time, made no substantial comment that I can recall.

Mr. Keenan: I ask that all that be stricken out.

The Court: Motion overruled.

Mr. Keenan: Exception.

Q. Was there anything said in that conversation about a transfer of these men to the medical unit?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.

624 Mr. Keenan: Exception.

A. I do not recall.

Q. Well, at any time subsequent to that conversation which you have just described, did you have any other conversation with Captain Radovich about these two men? A. I believe during the latter part of August Captain Radovich was then made Major, I believe. He stopped at my desk in my office and asked me to verify the location of the same two men for him. I called the statistical control

unit, which runs a card index on all personnel assigned, and obtained from them the fact that one was assigned to an airborne engineer unit at Westover Field, and the other to a similar unit at Bradley Field. I relayed that information to Major Radovich. He then asked me my opinion of whether these men could be transferred from these two organizations. My answer was no, because the two units were organized and activated for overseas duty, so far as I knew, and had a relatively high priority, at least on a par with other organizations which were destined for the same overseas duty—other types of organizations.

Q. And what, if anything, did Major Radovich say? A. He said that he was acquainted with the families of the men and would like to do something for them, would like to see them transferred, but that was about the entire conversation at that time. 626

Q. Was there anything said about how they might be transferred? A. During the discussion I told Major Radovich that the only way the men could be transferred would be on request from an organization with a higher priority.

Q. Now that is substantially this conversation? A. Yes, sir.

Q. Now at any time subsequent to that and in the summer of 1943 did you have any further conversation with Major Radovich about these two men?

Mr. Keenan: Your Honor, could we have the date fixed as nearly as possible on this? We are talking about the spring and summer and we don't get the distinction. 627

The Court: All right. Fix it as nearly as possible.

Q. First of all, did you have a subsequent conversation? A. Yes, I did.

Q. Now will you tell us as nearly as you can when that third conversation was had? A. Well, the second conversation was had toward the end of August. This third conversation was some two or three weeks later. It was during the interval that Major Radovich was preparing to leave the Fighter Command and physically joined the First Air Commando Group.

Q. Will you tell us what that conversation was? A. He telephoned from Washington to the Fighter Command on some job and when he was finished with that he had the call switched to me.

Q. Then you had a conversation with him on the tele-
629 phone? A. That is right.

Q. Will you tell us what was said by him and what was said by you? A. He asked me if the men were still at the same place, and I told him that so far as I knew the two organizations were still there.

Q. By that did you mean the organizations at Bradley Field and Westover Field? A. Had not moved. He asked me then if a request came through for a transfer to the Air Transport Command, did I think it would be approved. I gave him my opinion as no, inasmuch as the A.T.C. at that time was predominantly a continental installation. I did not know of any priority that they might have.

Q. You say a continental installation; you are talking about the A. T. C.? A. Yes; predominantly that.

Q. What did Captain Radovich say, if anything, after
630 that? A. That was about the complete telephone conversation.

Q. Subsequent to that conversation did you at some time later have a further conversation with Major Radovich about these two men? A. I did.

Q. Will you tell us as nearly as you can when this latest conversation was had? A. Approximately the end of September? At least several weeks after the phone conversa-

tion. I met Major Radovich on the base. He was back visiting. Then he later stopped in my office and we had another conversation.

Q. Give us the conversation, the substance? A. He was still interested in the two individuals; he still wanted to have them transferred if at all possible.

Q. That is, transferred out of the units at Westover and Bradley Fields, is that correct? A. Yes.

Q. What did he say? A. So he asked me at that time if I thought, if he asked for them, he was then a member of the First Air Command Group, if he asked for them through the group did I think the request would be honored and the men transferred to the group. I told him what little I knew about the group which was that it was a strictly volunteer organization so far as I knew which was being activated right from Army Air Force Headquarters and had the highest priority in the country at the time. It was activated for a special mission, which Major Radovich knows much more about than I do. I said I thought it probably would be, although I couldn't say yes or no. 632

Q. You mean the transfer from Bradley and Westover would be approved; that is, the transfer from Bradley and Westover to the Air Commandos probably would be approved? A. That is right. Then he asked me, after he got them into the group, how he could ever get them out of it. His intention was not to retain them in the group. So I told him, as in all fighter groups with which I have been familiar, that prior to shipment they drop their surpluses; they have to; they couldn't go through the port carrying surplus personnel. 633

So then he told me he was going to request the men—request the surplus, and through a connection he had in Washington, drop them when the unit left to A.T.C.

Q. Did Captain Radovich promise you any consideration? A. During one of our conversations he said that if he could make such a transfer it would be worth his while.

and he would see to it that it would be worth my while also.

Mr. Keenan: May we have the date of that fixed, your Honor?

The Court: Yes.

Mr. Keenan: Which conversation?

The Court: Which one do you refer to as best you can tell.

The Witness: The last conversation I believe, sir, to the best of my knowledge.

635 Q. Now, in December of 1943 did you receive in the mail a cashier's check in the sum of $500? A. I did.

Q. Did you know at the time you received it by whom it had been sent? A. I received a check in an envelope which was postmarked from West Palm Beach, Florida, and in the envelope was a cashier's check drawn on a West Palm Beach bank. The check surprised me, and I kept it for two or three days, wondering first what it was, and who from. Finally, knowing that no one owed me that money and I had no relative who would ever send me a check like that, I decided that the Air Commando Group must have moved or be moving, and it must have been from Major Radovich.

Q. Did you subsequently find out——

636 Mr. Keenan: Just a minute. Your Honor, I ask that all that answer be stricken out and this jury instructed by this Court to disregard every single word of it.

The Court: I shall grant that motion. I will strike that out and direct you ladies and gentlemen not to consider that at all.

Mr. McGohey: Do I understand your Honor is striking out the testimony that he received the check?

The Court: No, not that; only the surmise as to where it came from. That is a surmise and I will direct you not to consider that.

Mr. Keenan: Your Honor, we object to any evidence of his receiving a check. Is it charged that we sent that check? We haven't heard of that yet.

Mr. McGohey: May I proceed?

The Court: You may proceed.

Mr. Keenan: We object to this, and the jury being left to consider the fact that this man had received a check unless there is some showing or some charge made as to who sent it.

The Court: Objection overruled. 638

Mr. Keenan: Exception.

Q. Did you subsequently find out who sent that check to you?

Mr. Keenan: I object.

Mr. Robb: We object to that.

Mr. Keenan: It is highly improper.

The Court: Objection overruled.

Mr. Keenan: Exception.

Mr. Robb: Exception.

The Court: You were asked did you find out.

The Witness: Yes, I did.

Q. And who? 639

Mr. Keenan: I object.

Mr. Robb: I object.

Q. Who?

Mr. Keenan: I object to that. I think the United States Attorney knows full well that that is not a proper question.

The Court: I don't think it is. He may have found out by inadmissible testimony. He may have found it out by any method. I don't know whether his testimony would be proper on that.

Mr. McGohey: I understand your Honor sustains the objection to the question?

The Court: Yes, to your question, "who".

Q. Subsequent to the receipt of that check did you have a conversation with Major Radovich? A. I did not.

Q. With respect to that check? A. I did not. I never heard from him after that. He departed for overseas, I understand.

641 Q. I say at any time subsequent to the time you received the check did you have any conversation with Major Radovich with respect to that check? A. None that I can recall, sir.

Q. When did you first meet Major Radovich at Mitchel Field? A. When he first reported to the Headquarters.

Q. Do you recall when that was? A. Not exactly. It was some time in the early part of 1943, as closely as I can recall.

Q. Some time in the early part of 1943 you were the personnel officer for the Fighter Command? A. No, I was not, sir. I was the classification officer.

Q. Classification officer? A. Yes, sir.

Q. How old is Major Radovich, do you know? How old
642 was he in 1943? A. All I know is from the newspapers; he was approximately 25 or 24 at that time.

Q. At that time, and in 1943 his rank was what? A. Captain.

(Mr. McGohey confers with Mr. Wallace.)

Mr. McGohey: I don't think I caught the last answer, your Honor.

The Witness: He was a captain.

Q. He was a captain? A. Yes.

Q. And his age was about 24? A. Yes, sir.

Q. What did you do with this check that you testified you received? A. I destroyed it.

Mr. McGohey: I have no further questions of this witness.

Cross-examination by Mr. Keenan.

Q. Captain, how old are you? A. I was 31 this month, sir—last month, excuse me.

Q. And where are you located now? A. Mitchel Field, New York. 644

Q. Where were you located before that? A. Jefferson Barracks, Missouri.

Q. When? A. That was in July of 1942.

Q. Did you come from Jefferson Barracks, Missouri, to Mitchel Field in July of 1942? A. Yes, sir.

Q. Since then you have been permanently stationed there? A. That is right, sir.

Q. At Mitchel Field? A. Yes.

Q. As a member of the ground force, is that correct? A. In the First Air Force.

Q. I believe you have said that you never met any of the Bayers, either Samuel or Elias Bayer? A. That is right.

Q. Before today in the court room have you ever seen them? A. I understand they were at Mitchel, but I didn't recognize them and wouldn't remember them. 645

Q. I didn't ask you whether they were at Mitchel; I just asked you if you ever saw them before, or recognized them? A. They were pointed out to me yesterday for the first time.

Q. And I assume you never had any conversation with them? A. No, sir.

Q. Or any communications of any kind? A. No, sir.

Q. Now, when you first discussed these two boys with Major Radovich, where were the boys located? A. They were assigned to the Airdrome Defense Section, Headquarters First Fighter Command.

Q. That first conversation I think you said was some time in the spring, was it, of 1943? A. It was the early summer of 1943. That is the best I can put it.

Q. You were asked some questions about their transfer by Major Radovich at the first conversation? A. I don't recall other than the fact that the two men's names came up in the conversation.

Q. That is all you recall? A. That is all I recall.

647 Q. You don't know how it came up. You don't recall anything more definite than that? A. No.

Q. Is that right, captain? A. That is right.

Q. Were you asked to transfer them any place on Mitchel Field by Major Radovich? A. No, sir, I had no——

Q. That is all. I asked you, if you were asked to do it. A. No.

Q. If you will just answer my questions we will get along all right. Did you have anything to do with the transfer of personnel as classification officer? A. No, sir.

Q. It wasn't part of your duty at all? A. No, sir.

Q. By the way, what were your duties as classification officer, very briefly? A. To determine what abilities a man had for training in a particular army specialty, that is, to select for training, to earmark trained men properly and to

648 recommend to the A1 proper assignments.

Q. Are you talking now about enlisted men and officers both? A. Both.

Q. And did you have some assistants on your staff as the classification officer at Mitchel Field? A. Well, I was the classification officer, First Fighter Command.

Q. What did that comprise? A. It comprised a Headquarters and Fighter Control Squadrons which were spread from Maine to Florida.

Q. Yes. A. And Fighter groups which were in training for the same spread of territory.

Q. And as far as you recall, some time in the early summer, which was the first time you ever talked to Radovich about these boys—when I say boys, I mean Usdan and Martin Bayer; I don't want to keep repeating their names—you believe they were some place at Mitchel Field and he was in the First Fighter Command, in your outfit? A. They were definitely in the First Fighter at that time.

Q. Do you know whether they were then in the hospital unit? A. The Fighter Command has nothing to do with the hospital unit; that is a base function.

Q. There is nothing but the Air Force out at Michel Field, is there? A. No, sir. There are four Headquarters at Mitchel Field. 650

Q. Is there a headquarters of anything besides the Air Force of the United States? A. Headquarters First Air Force; headquarters First Bomber Command.

Q. Bomber Command. That is two. A. Headquarters First Fighter Command.

Q. Fighter Command. A. And then the Base Headquarters itself, that performs all the housekeeping duties.

Q. But it all has to do with aviation. A. It is an air force organization.

Q. Exclusively. A. That is right.

Q. And you have many clerks out there in that organization? A. Hundreds.

Q. Hundreds of them? A. Yes. 651

Q. And I suppose it would be proper to ask you as classification officer, you have a good deal to do with clerical work, don't you, supervising it or discussing same? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. And it is a useful occupation, of course, isn't it? A. Yes.

Q. In the Army? A. Yes.

Q. And a necessary one? A. Very.

Q. Did you know these two enlisted men? A. I did not.

Q. Did you ever see them, to be sure that you saw them? A. No.

Q. You have told us about the first time that the names came up; you don't know in what connection; you discussed it with Major Radovich. Then there was a second conversation where you were asked, I think, if you wouldn't identify their designation? Is that the term? Identify their position where they were? A. Their unit of assignment.

Q. Is that what you were asked to do, to identify their unit of assignment? A. Yes, sir.

653 Q. You were asked to do that by Captain Radovich? A. Yes, sir.

Q. And was he a captain then? A. He was.

Q. And were you a lieutenant or a captain then, do you recall? A. I was just in the process of change. I think I was still a lieutenant.

Q. Well, you were an officer at that time? A. Yes.

Q. And was he talking to you, as I understand it, in the line of duty making these inquiries of you, or just in a friendly conversation? A. Friendly conversation.

Q. Was he trying to influence you to do anything at all, Captain Radovich, at that time?

Mr. McGohey: I object to that.

The Court: I sustain the objection.

654 Mr. Keenan: I except.

The Court: It calls for a conclusion.

Q. Did he ask you to do anything excepting to see where the men worked? A. He asked me for an opinion only.

Q. I mean, did he ask you to do anything with reference to transferring them from one place to another? A. He did not because he knew——

Q. Well——

Mr. McGohey: I submit the witness ought to be allowed to answer the question.

Mr. Robb: I object to that, sir.

The Court: I don't think what he was about to say is proper. It concludes what the other man was thinking. If it is with reference to anything he said, Captain, go ahead.

Q. What I am trying to get at is, you didn't have anything to do with effecting these transfers yourself? A. I did not.

Q. And you were not asked to, were you? A. No, sir. 656
I was asked for an opinion only.

Q. And that, as you told us frankly, in a friendly way by Radovich? A. Yes, sir.

Q. Not in the line of duty at all? A. No, sir.

Q. Did Radovich offer to give you any money? A. I have testified that in one of my conversations that he stated it would be worth my while too.

Q. Did you know what he meant by that? A. Not that I recall.

Q. Did you consider that he was attempting to corrupt you by that suggestion?

Mr. McGohey: I object to that.

Mr. Keenan: I think it is highly important. 657

The Court: I will let him answer.

A. Will you repeat the question?

Q. (Question read.) A. I did not.

Q. Now, these clerks that were out there, they wore the same uniforms as the other soldiers? A. All soldiers wore the same uniform.

Q. And they were subject to the same discipline? A. Yes, sir.

Q. By the way, can you tell us something about the duties of the clerks out there? Soldiers who were assigned to clerical duties? Just very briefly. A. Clerk's duties in the Army vary considerably; it would take a long time to do that.

Q. And you don't happen to know what these boys were doing while they were in the Fighter Command? A. No, sir.

Q. Do you know whom they worked for? What particular officers? A. I know that they were working—I know that the Airdrome Section was a subsection of the A3 section.

659 Q. Do you know anything about the training that they got? A. I know nothing about the men personally whatsoever.

Q. Well, do you know whether or not they had basic training? Do you know of your own knowledge? A. I know of my own knowledge only that I myself received basic training.

Q. I did not ask you that. You are not the subject matter of the inquiry. Did these boys? A. I don't know, sir.

Q. You went to Officers' Candidate School? A. Yes.

Q. And you had basic training, didn't you, before you went to the Officers' Candidate School? A. The first three months of a man's service are devoted entirely to basic training.

Q. Yes, should be. A. By regulation should be.

660 Q. That is not always true, is it, Captain? A. No, it is not.

Q. I say that because I had a son in the Army who didn't get it, and I tried to get it for him. Captain, when Captain Radovich spoke to you about where these men were, to find out, you reported back to him? You told him where they were. A. Yes, that is right. He sat there while I called the statistical control section.

Q. And they told you they were at Westover Field? A. That is right, sir.

Q. Do you know how long they had been there at the time that you made the inquiry? A. No, I do not.

Q. Approximately? A. Well, they were still in the Fighter Command in July. So they couldn't have been up there more than a month and a half.

Q. More than a month and a half; and I imagine you have looked into this matter fairly carefully in the last few months, haven't you? A. I know considerable more about it now, sir.

Q. You had several conversations with the United States Attorney? A. I have, sir.

662

Q. And with Mr. Wallace, his assistant? A. I have, sir.

Q. And with some of the military intelligence? A. I have, sir.

Q. And some of the members of the Federal Bureau of Investigation? A. Yes, sir.

Q. Statements have been taken from you? A. Yes, sir.

Q. And signed by you? A. Yes, sir.

Q. So that it has been the subject matter of your own inquiry on your own part? A. Yes, sir.

Q. And you say it was about, the best you can recall, a month and a half that they had been at Westover Field when you called up; the best you can recall? A. Well, that was approximately the last lapse of time between the time I knew they were definitely at the First Fighter Command and the time I made the call.

663

Q. We realize that is an approximation. We hope to get the exact time later. The Army will have the exact dates of when these men were transferred, won't they? A. Yes.

Q. And they will be permanent? A. Yes.

Q. And they are at Mitchel Field. They shouldn't be difficult to be brought in.

Mr. McGohey: I object to whether it is difficult. That is not part of the direct examination.

The Court: Sustained.

Q. When Captain Radovich spoke to you about these men and they were then at Westover Field, you told him, without going into it, that there were a good many rumors around about these men, right? A. Yes, sir.

Q. You also told him there was a remarkable similarity, or I think I have you using the term—I might have overemphasized it—in the uniforms of certain officers? A. Yes, sir.

665 Q. Was there something peculiar about the uniforms the officers used out there? A. Nothing that I had personally observed.

Q. But some other people had observed? A. Yes, sir.

Q. Did they look as though they weren't regulation? A. No, sir, strictly regulation.

Q. Well, what was it that was similar about the uniform of an officer? Don't they all wear garbadine uniforms? A. You can call in any military witness and have him stand next to me and closely examine our attire; you will find they are not alike. They are green or they are pink or green and green cut on a similar pattern, but there are distinct differences.

Q. I don't suppose the men out there in the air force pay particular attention to the cut of any officer's uniform, or
666 the particular grade garbadine he has on.

Mr. McGohey: I object to this line of questioning. This witness testified to a rumor that he repeated to Radovich. The witness didn't testify he made any observation of similarities. All he testified to is the rumor that he repeated to Radovich. I object to the whole line of questioning about the similarity of uniforms.

Mr. Keenan: They brought it out.

The Court: I am not going to strike that out. It has been testified to already. Go ahead.

Q. You didn't notice anything strikingly similar about the uniforms of any officers, did you?

The Court: You asked him that question and he replied in the negative.

Mr. Keenan: I beg your Honor's pardon. I didn't hear it.

Q. May I ask you if it would be correct to assume that you were rather putting Captain Radovich on his guard 668
that there was a good deal of talk about the transfers of these boys out of Mitchel Field, from Mitchel Field to Westover Field? A. I simply repeated to him what had been told me, which he may or may not have known before.

Q. By the way, you were on friendly terms with Captain Radovich at the time, were you not? A. Yes, sir.

Q. You had always gotten along with him all right? He was a brother officer? A. We never disagreed.

Q. Well, you were out in the same field together and friendly? A. Yes, sir.

Q. Is that correct? A. Yes, sir.

Q. And he felt friendly enough to you to ask you questions about this, apparently? A. Yes, sir.

Q. Is it not in substance a fact that you felt that there 669
was trouble brewing about these transfers at that time and you wanted to let Captain Radovich know about that? A. Yes, sir.

Q. Did you make any report to your superior officer about any activities of Captain Radovich at that time that you felt were irregular or improper?

670

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. I did not, sir.

Q. By the way, was he your commanding officer? A. He was not.

Q. He was next in command to you? A. In the A-1.

Q. I know, but please tell us who A-1 was; that is the name of— A. At that time it was Colonel Kunish.

Q. You had discussed this matter with Colonel Kunish? A. I did not.

Q. Any of these matters? A. I did not.

671 Q. Have you ever discussed it with him? A. He has been overseas for some time.

Q. When did he go overseas?

The Court: Are we interested in when Colonel Kunish went overseas?

Mr. Keenan: I am just interested, your Honor, in finding out if he considered this irregular.

The Court: You asked him that.

Q. Well, in substance you didn't consider that there was anything about what you heard from Captain Radovich or what he was apparently involved in that called for you to make any complaint about him or to tell any of your superior officers about him?

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Mr. McGohey: I object.

Q. Is that correct?

The Court: I will overrule the objection.

Q. (Question read.)

Mr. McGohey: I press the objection. I think that is wholly immaterial.

The Court: I am going to sustain the objection on that ground, and also because he has already testified that he made no complaint.

Mr. Keenan: Exception.

Q. There were rumors of other irregularities out at Mitchel Field, were there not?

Mr. McGohey: I object to that. There is no testimony on that.

The Court: Objection sustained. 674

Q. Was it not the subject matter of wide inquiry?

Mr. McGohey: I object, your Honor.

The Court: What was the question?

Mr. Keenan: Was it not the subject matter of wide inquiry within this witness' knowledge, the irregularities at Mitchel Field.

Mr. McGohey: At what time?

Mr. Keenan: At any time. We tried to fix it as accurately as you do.

Mr. McGohey: It is immaterial, if your Honor please.

The Court: I sustain the objection.

Mr. Keenan: Exception. 675

Q. Now, you got a check for $500 in December of 1943? A. I did, sir.

Q. And what bank was it drawn on? A. It was drawn on a West Palm Beach bank. I don't know which one. I don't recall.

Q. Well, is that the only check you ever got of that nature while you were in the Army? A. It is.

Q. Did you take a copy of it? A. I did not, sir.

Q. Did you tell anyone about it when you got it? A. I did not, sir.

Q. Did you consider it had anything to do whatsoever with the Radovich episode that you discussed at any time? A. I thought it might have.

Q. Well, wouldn't that indicate, if true, some corruption upon the part of Radovich if he was trying to give you some money?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: Oh, your Honor, I think in fairness I ought to be able to ask that.

677 The Court: All right. Answer it.

Q. (Question read.) A. It might.

Q. Well, didn't it? A. Inasmuch as I had no way of contacting him and making sure in my own mind, I didn't do anything about it.

Q. Well, you could have told your superior officer about it without contacting Major Radovich, couldn't you? A. I could have but I didn't.

Q. You destroyed it? A. I destroyed it.

Q. Without taking a photostat of it or without any notation as to the name of the bank or in any manner trying to trace where that check came from? A. Yes, sir.

Q. Have you ever told the F.B.I. or the military intelli-
678 gence or Mr. McGohey the name of that bank? A. No, I never knew the name of the bank.

Q. Do you know the date of the check? A. I do not, sir.

Q. Don't you know that there would be a number on that check if it was a cashier's check of a bank? A. I am familiar with cashier's checks.

Q. You are familiar? A. Yes, sir.

Q. What was your avocation before you got in the Army?
A. I worked for an automobile finance company.
Q. Well, you knew very well that if you reported to the Army the number of that check and the bank upon which it was drawn, that an inquiry would have been made and found out who the bank delivered that check to?

Mr. McGohey: I object to that.
The Court: Overruled. I will overrule the objection. Go ahead.

A. The military knew who the check came from.
Q. The military knew who the check came from? A. Some time during September or October following—that would be 1944—— 680

Mr. Robb: If the Court please, I submit this answer is not responsive to the question.
Mr. Keenan: I think it is not responsive, but I don't object to it. I want to hear all about this check.
The Court: What is the objection?
Mr. Robb: Upon the ground that this answer that he is trying to give does not respond to the question that he was asked.
The Court: All right. I sustain the objection.
Mr. Keenan: May I have an exception to that?
The Court: Do you want him to testify to it?
Mr. Keenan: Oh, yes. I want all the light I can get on this check. 681
The Court: You say it is not responsive?
Mr. Robb: Yes.
The Court: All right, I will overrule the objection. You may proceed. Go ahead.
Mr. McGohey: I would like to know what the state of the record is.

The Court: The state of the record is that counsel for the defendant Radovich objects to the answer because it is not responsive to the question.

Mr. McGohey: And may I have the Court's ruling?

The Court: I overrule his objection.

Mr. McGohey: The Court is overruling the objection?

The Court: Yes. Mr. Keenan wants the testimony.

Mr. Keenan: Your Honor has sustained the objection, and I assume that is to protect——

The Court: You insisted upon the answer, so I now overrule the objection.

683 Mr. Keenan: Well, if your Honor feels that it would be unfair to one of the defendants in this case to permit that testimony, I will withdraw it at least for the time being.

The Court: Counsel for the defendant Radovich based his objection on that ground. He based it on the ground it wasn't responsive to your question.

Mr. Keenan: Well, now, I withdraw the question.

Q. I ask you if you do not know yourself that that check could be identified if you would give the number to your superior authorities, the number of the check and the name of the bank. I am asking you about your own knowledge now. A. Yes. If you turn in the number of a cashier's check it can be traced if you know the name of the bank.

684 Q. Were these boys, either of them, under your jurisdiction in any manner, fashion or form when they were located at Westover Field or Bradley Field, either Usdan or Bayer? A. Only insofar as I was the over-all classification officer for everybody assigned to the Fighter Command. They never worked for me.

Q. They still were in the Fighter Command, were they, at Westover Field? A. No, sir. I misunderstood your

question. At Westover Field they were entirely outside of the Fighter Command jurisdiction.

Q. And that is where they were at the time of your second and subsequent conversations with Radovich? A. Yes, sir.

Q. You wouldn't, of course, then have any authority to order their movements any place at Westover Field? A. I would not have any authority no matter where they were because I was classification officer.

Q. If anybody was attempting to pay you $500 for anything, you don't want to take it because, of course, it would be highly improper, but you hadn't done anything to earn it, had you? A. No, sir. 686

Q. You said something about voluntary service in answer to one of the questions. I didn't get it very clearly. What did you have reference to? A. In my discussion of the First Air Commando Group, I stated that it was my belief or understanding that the group was composed entirely of volunteers. I don't know that definitely as a matter of fact.

Q. Where did you get that understanding from? You testified to it. I would like to know. Do you know that that is a fact today, now? A. All I know about the group is this, that a certain air force officer was authorized or volunteered to perform a special mission for the Army Air Force in the C.B.I. theatre.

Q. What is the C.B.I.? A. China, Burma, India.

Q. All you know is that a certain officer was designated 687
or authorized or directed or all three of them, to organize some force for the China, Burma, India theatre of war? A. That is right. To do a very special type of job.

Q. Do you know anything more about that? Can you describe that any better? A. I think Major Radovich can give you more——

The Court: I don't think that is material.

Mr. Keenan: Well, he testified about it, your Honor. He testified it was a voluntary service.

The Court: Now you want to know what he was to do in China, Burma and India?

Mr. Keenan: I want to know something about it if I can find out.

The Court: I sustain the objection to what he was going to do in China, Burma and India.

Mr. Keenan: Perhaps there is a misunderstanding on my part.

The Court: Go ahead.

689 Q. Was this the unit to which these two boys were sent from Westover Field down to Goldsboro? Yes or no, if you know? A. I don't know except what I have been told. I don't know as a matter of fact.

Q. Do you know from your preparation for testifying in this case? Did you study the matter? A. I know from the military only.

Q. You wouldn't expect to know it from any place other than the military, would you? What do you know from the military as to whether or not this special mission to Burma, India and China was the mission or the outfit to which these two boys were plucked out of this company?

Mr. McGohey: I object to "plucked out".

690 Q. Taken out of this camp at Westover and Bradley Field and transferred to——

Mr. McGohey: I object to the form of the question and I object on the ground that it is not material.

Mr. Keenan: It is cross-examination.

The Court: I am going to overrule the objection. Go ahead and answer, if you know.

A. I simply know that the unit——

The Court: You were asked a simple question, whether these men Usdan and Bayer were transferred to the Air Commandos. Do you know?

The Witness: No one ever told me directly, your Honor.

The Court: We will take a recess now for lunch until 2.15.

(Recess until 2.15 P. M.)

AFTERNOON SESSION.

692 The Court: Call Captain Pepper back.

JOHN K. PEPPER, resumed the stand.

The Court: Mr. Keenan, have you further questions?

Mr. Keenan: Just one or two.

The Court: Go ahead.

Cross-examination continued by Mr. Keenan.

Q. The outfit to which Usdan and Bayer were transferred you have referred to as a volunteer outfit, I believe? A. So far as I know.

693 Q. Is that what is commonly referred to as—I think his Honor did—a commando unit or commando outfit? A. The correct designation is First Air Commando Group.

Q. And they were going on the special mission that you referred to? A. Yes, sir.

Q. Do you, as classification officer, do you have knowledge as to whether or not men would have to volunteer to go on such a mission or whether they could be compelled to go regardless of their wishes? A. The extent of my knowledge is this, that the colonel who is in command of the

group could have anyone he desired. He selected all of his officers, and the officers in turn, who knew enlisted men who were good, submitted requests for them and all requests were honored.

Q. I will ask you again then: When you used the term "volunteer" what did you mean by that? A. Normally, if an officer goes to a man and asks him—he wants him to go with his outfit and the man says, "I am not interested; I don't want to go," he won't take him.

Q. I would still like to ask if the word "volunteer" means that it is optional with the man whether he goes or not? A. So far as I know, it was optional in that group.

695 Q. Would that apply to Usdan and Bayer, privates too, or was that just optional with the officers? A. Officers and enlisted.

Q. So that, as you understand it, either Usdan or Bayer could have objected to going with that outfit and they could not have been compelled under the Army regulations to have gone with that unit to which they were transferred? A. I don't know. The thing that I do know is this; that if they were requested by name, the request would be honored from their current organization and they would be so transferred.

Q. When they have those volunteer organizations, is it customary to order the enlisted men to go or to ask them whether they would like to go or not? A. The enlisted men are always ordered to go.

696 Q. Then it is not voluntary upon their part? A. In a unit like this, the men would not be asked unless they were willing to go, as I understand it.

Q. How would they find out whether the men were willing to go or not? A. The channels between the unit to which the men were assigned and the First Air Commando Group are not interested in whether the men volunteer or not. They are simply honoring a request.

Q. What I am asking you is, if I understand, and I want to do this as briefly as possible, to get to this matter: You have told us that these men did not have to go unless they wanted to and that applied to enlisted men as well as officers, they did not have to go to this Commando unit? A. I didn't say that. I said that the unit, so far as I knew, was composed of volunteers. I don't know whether these two men volunteered or not.

Q. But you can't help us then, to enlighten us as to whether or not it was purely a voluntary service or whether they could have been compelled to go regardless of their wishes? A. No, I cannot say.

Q. That, by the way, was the unit that was commanded by Philip Cochran? A. That is right, sir. 698

Q. And that was very well known; was in the strips of the newspapers of Philip Cochran? A. Yes.

Q. Like Superman and these other strips of that type? A. It was, sir.

Mr. Keenan: That is all.

The Court: Any questions?

Mr. Robb: Yes, sir.

Cross-examination by Mr. Robb.

Q. Captain Pepper, when did you tell us you came into the Army? A. I was inducted in June of 1941, Mr. Robb.

Q. You testified, I believe, that you were stationed for awhile at barracks in Missouri—Jefferson Barracks? A. That's right. 699

Q. Was that your first station? A. That was my first station as an officer.

Q. Where were you stationed before that? A. I was at Fort Sill, Oklahoma, as an enlisted man.

Q. You went from there to Jefferson Barracks? A. No, I went from there to Officers Candidate School.

Q. Then to Jefferson Barracks? A. That is right.

Q. Then to Mitchel Field? A. Yes.

Q. Where you still are? A. That is right.

Q. Captain, you have made a great many statements, both written and oral, about this case, have you not? A. Yes, sir, it has been a very long investigation.

Q. You made them to the FBI? A. Yes, sir.

Q. And you made them to Mr. McGohey and his assistants? A. Yes, sir.

Q. You made one or more written statements to the investigators out at Mitchel Field, the Army investigators, did you not? A. Yes, sir, I did.

701 Q. When did you make your first statement to any Army investigator? A. Approximately in August 1944.

Q. Who was the officer to whom you made that statement? A. A Major Hogan, I believe, sir, from Washington.

Q. What was his position? A. Frankly, I don't know, except that he was an investigating officer.

Q. I mean, Army Intelligence? A. I don't know.

Q. Or the Inspector General's? A. I didn't notice what his branch was.

Q. How many statements did you make to him? A. I made one in August and then one, approximately, a month later.

Q. Those were both written statements? A. Yes, they were taken by a stenographer.

Q. That was 1944? A. Yes, sir.

702 Q. Did you also make some verbal statements to him that were not taken down? A. No, sir. I think that everything that I had to say to Major Hogan was taken by a stenographer.

Q. What other officer or officers did you make statements to? A. The only other written statement that I can recall, sir, was to Mr. Flynn or one of his associates.

Q. Didn't you make a statement to a Colonel Snyder at Mitchel Field? A. Yes, sir, I did.

Q. When did you make that statement? A. During the early winter, I believe, of 1944.

Q. Colonel Snyder was the investigating officer in this particular case? A. Yes, sir, he was.

Q. By that I mean the case of the defendant Major Radovich. A. He was the First Air Force investigator.

Q. How many statements did you make to Colonel Snyder? A. Only one, in so far as I can recall.

Q. Then you subsequently testified, did you not, at the court-martial trial of the defendant Major Radovich? A. I did, yes, sir.

Q. And that was last June at Mitchel Field? A. Yes, sir.

Q. Before you testified at that trial you were interviewed, weren't you, by one or more officers who were prosecuting the case? 704
A. Members of the Judge Advocates Section, yes, sir.

Q. Major Osborn? A. Yes, sir.

Q. Anybody else? A. Major Osborn was, I believe, the only one, sir.

Q. How many times have you made statements to Mr. McGohey or any of his assistants, either verbal or written? A. There are possibly four, sir.

Q. Where? A. Where?

Q. Yes. A. In this building, sir.

Q. Captain Pepper, it is a fact, is it not, that as a result of certain statements that you made to Army officers at Mitchel Field you yourself were charged with a violation of the 95th Article of War, conduct unbecoming an officer 705
and gentleman, and with a violation of the 96th Article of War, conduct to the prejudice of good order and discipline in that you had not told the truth, isn't that correct? A. That is not true, sir.

Q. Weren't you charged under those Articles of War? A. So far as I know, no, sir.

Q. Were charges not preferred against you? A. Not to my knowledge.

Q. Let me see if I can refresh your recollection. Would you know your statement to Colonel Snyder if you saw a copy of it? A. Yes, sir.

Q. I show you this document and ask you if that is not an official copy of your statement to Colonel Snyder? The pencil notations on there are mine, if that will help you. A. This is a copy, sir.

Q. That is the copy of the statement you made to Colonel Snyder. Let me read the opening paragraph of that statement, which is a statement to you by Colonel Snyder. The statement is headed, "Statement of Captain John K. Pepper, Air Corps, 01000168, given to Lieutenant Colonel
707 George Snyder, Air Corps Investigating Officer at Headquarters, First Fighter Command, on 21 August 1944.

"Colonel Snyder: This is an investigation of courts-martial charges preferred against you in relation to making a false statement. Court-martial charges have been prepared against you and you have been charged under the 95th and 96th Articles of War. I will show you the charges. And in the meantime will you please state your full name, rank and serial number.

"Answer. John K. Pepper, 01000168, Captain, Air Corps."

Do you still say that charges were not preferred against you under the 95th and 96th Articles of War for making a false statement? A. No, sir, I do not. I had forgotten completely about that statement and I was referring simply
708 to the fact that I was punished under the 104th Article of War.

Q. I am going to get to that, Captain. Had you forgotten about the charges being preferred against you? A. Yes, sir, I had.

Q. You had forgotten that? A. Yes, sir.

Q. That was not sufficiently important so that you remembered it? A. No, it was very important, sir.

Q. You mentioned pleading guilty under the 104th Article of War. You subsequently pleaded guilty under that Article of War, to making a false statement, and accepted a relatively minor punishment, didn't you? A. Yes, sir.

Q. And what was the punishment? A. I was administratively reprimanded and forfeited 50 per cent of my base pay for one month.

Q. And when did you do that? A. That was in February or March of this year.

Q. Of this year? A. Yes, sir.

Q. Captain, did you have any discussion with any officers at Mitchel Field or anybody else about any consideration that might be given you by letting you plead guilty under that lesser Article of War, any consideration that might be given you in return for your testimony in this case? A. No, sir, none. My decision to take—— 710

Q. You have answered the question.

The Court: You may finish your answer.

Q. Nobody said anything about that?

The Witness: May I continue?

The Court: I said he may finish his answer.

Q. Go ahead. A. I accepted the 104th against my own will upon the advice of my immediate superior, Colonel Nichols.

Q. Who is that? A. He is the A-1 of the First Air Force. 711

Q. Who is he? A. He is an Army officer, Colonel.

Q. What is his name? A. Colonel R. T. Nichols.

Q. Those charges were pending against you then from August, the date of this statement that I read you, until February of this year, right? A. Yes, sir.

Q. When did you first talk to the United States Attorney or any of his assistants about this matter? A. In the fall of 1943.

Q. 1943? A. 1944. I am not positive.

Q. Did you have any discussion with him about the charges pending against you with the Army? A. I don't recall, sir.

Q. You would not say you did not? A. I wouldn't say I did.

Q. But you would not say you did not either, would you? A. No, I could not.

Q. Could you have forgotten that discussion the same way you forgot these charges that were pending against you? A. No, sir.

Q. That would be more important? A. No, sir.

713 Q. Captain, would you tell us again just what your duties were as a classification officer? A. To determine what type of training a man should be given based on his background, education and general level of intelligence.

Q. Did you have anything to do with transfers? A. I did not.

Q. It was not your business, was it? A. No, sir, it was not. However, I would like to qualify that.

Q. Go ahead. A. Most of my time was spent on the road with fighter groups, checking fighter groups for proper assignment and utilization of the assigned people; in other words, that a mechanic was working as a mechanic and not as a cook.

Q. In particular, the transfer of Bayer and Usdan was not any concern of yours, was it? A. No, sir, it was not.

714 Q. Captain, isn't it a fact that before you ever had any conversation with the defendant Major Radovich about these boys, you had been checking on their status to see if they could not be transferred? A. See whether they could be?

Q. Or to see if they were going to be. A. Their names were first mentioned——

Q. Pardon me. A. I will have to go into this in order to answer the question.

Q. I think you can answer that question. Hadn't you checked on their status before you ever talked to Major Radovich? A. Yes.

Q. You called up a Captain Adams, is that right? A. That is right.

Q. And Captain Adams was the classification officer in their particular unit, is that right? A. That is right.

Q. How long before you had this conversation that you told us about with Major Radovich did you yourself begin checking on these boys? A. Just a relatively short time.

Q. How many days? A. I don't know.

Q. Captain, your testimony is that it was a few days after that call you made to check on the status of these 716
boys that you had this conversation about the boys with the Major, is that right? A. Yes, sir.

Q. You told us that Major Radovich brought up the matter—pardon me—that you told Major Radovich about these uniforms, isn't that right? A. That is right, after their names had come up earlier in the discussion.

Q. That is right. Now, Captain, isn't it a fact that the man who mentioned the uniforms was Major Radovich and not you? A. No. Someone else mentioned the uniforms to me before he did.

Q. I beg pardon? A. Someone else——

Q. No. But in that conversation, isn't it a fact that he mentioned it to you, about these uniforms being similar or something of that sort? A. I think that I mentioned that 717
to him, Mr. Robb.

Q. Didn't Major Radovich tell you that it seemed to him that there was a lot of rank interested in these boys? A. He did, and I also said that to him.

Q. By "rank," meaning high-ranking officers? A. That is right.

Q. That is right. Now, Captain, that conversation you had at that time with Major Radovich was continued, was

it not, in the office of Colonel Vidal, Colonel Felix Vidal? A. About 30 minutes later or less.

Q. That is the same Colonel Felix Vidal who was here in the witness room yesterday? A. That is right, sir.

Q. That was continued in the presence of the defendant Radovich, wasn't it? A. Yes, sir.

Q. Tell us what was said in that part of the conversation which you didn't tell us before.

Mr. Keenan: I think these conversations in the absence of the Bayers are taken under that same exception?

The Court: All right. Go ahead.

719

Q. The conversation was continued in the office of Colonel Vidal. Now tell us about that situation of the conversation. A. When I left Major Radovich I went back to my office and 10 or 15 minutes later received a phone call to report to Colonel Vidal, which I did. Major Radovich was there. And he told me in no uncertain terms——

Q. Who told you? A. Colonel Vidal. (Continuing) —to mind my own business.

Q. Is that all? A. He said that in a colorful way, but that was all.

Q. Is that all that he told you? A. That is all that I recall.

Q. Do you recall you testified at the court-martial, the
720 court-martial of the defendant Major Radovich? A. I do.

Q. Were you asked this question and did you make this answer: "And you were told at that time"——

Mr. Wallace: What page?

Mr. Robb: Page 48.

Q. —"And you were told at that time"—meaning the time you talked to Colonel Vidal—"You were told at that

time, were you not, that nobody was helping or protecting these men, is that right?" A. Yes, sir.

Q. And did you make this answer, "I was told that in so many words, yes, sir." A. Yes, I did.

Q. And that was the truth, wasn't it, that you were told that? A. I was told that.

Q. Yes, sir. You were told that by Colonel Vidal? A. That is right, sir.

Q. Captain, did you ever tell the defendant Radovich that you woud like to help get these boys transferred but you couldn't do anything about it? A. I told the defendant Radovich that I would like to help him if I could, because he was a friend of mine.

Q. You told him you would like to help him, is that right? A. Words to that effect.

Q. By transferring these boys? A. No, not necessarily by transferring——

Q. That is what he was talking about, according to you, wasn't it? A. I had nothing to do with transfers. Give him any advice, but that was all.

Q. Would you say now that you didn't tell Major Radovich you would like to help transfer these boys? A. I may have said to him, just as I would say to anyone who came in to me and asked me something which wasn't, I believe, my jurisdiction, that I would like to help him but couldn't.

Q. Do you recall whether you said that or not? A. Frankly, I am not sure.

Q. Captain, will you give us the exact words again that you say were used by Major Radovich when he told you that there might be something in it for you or him if you transferred these boys? What was the exact expression that he used? A. I can't say; I don't recall, Mr. Robb.

Q. You don't recall? A. Not exact words, no, sir.

Q. You testified on direct examination that he said that it would be worth your while. Are you sure that is what he said? A. I don't think he said worth my while or his

while, because he doesn't use that type of expression, but something similar to that.

Q. Do you recall testifying at the court-martial——

Mr. Wallace: What page?

Mr. Robb: 43.

Q. —that what he said was, "It might be to your advantage"? A. Yes. It means the same thing to me. I don't think he used those words, exact words.

Q. You were under oath at the court-martial, weren't you? A. Yes, but I was not repeating exact——

Q. Just a minute.

725

The Court: Let him finish.

Q. Go ahead. A. I wasn't trying to repeat exact conversations, which is almost an impossibility; trying to convey the same feeling or the same——

Q. But you had been over this matter time and time again, haven't you? A. Very, very frequently.

Q. And a great many people asked you what was said, hadn't they? A. Yes, sir.

Q. And you had made a lot of statements about it, haven't you? A. Yes, sir.

Q. And you tried to remember just exactly what was said, haven't you? A. Yes.

726 Q. And at the court-martial you testified the words used were "it might be to your advantage," didn't you? A. Yes, sir.

Q. Captain, is it your testimony now that that conversation took place at Mitchel Field when you were both there, both you and Major Radovich? A. Yes, sir. He visited the field; he was no longer assigned there.

Q. He was at the field? A. He was physically present.

Q. Didn't you testify at the court-martial that that conversation took place over the telephone when he called you from Washington? A. I don't think so.

Mr. Robb: Page 43, Mr. Wallace.

Q. Let us see if I can refresh your recollection. "Sometime, approximately the time the First Air Commando Group was being organized, I believe, Major Radovich had already left Mitchel Field, I received a telephone call from him regarding the two men and asking what their current status was, whether I thought they could be transferred from the units to Air Transport Command. I told him that the units, being alerted, would certainly have a higher 728
priority than an A.T.C. organization and I did not believe they could be transferred.

Q. "Can you fix the approximate time of this conversation to which you are referring? A. September or October of the same year.

"Q. During the course of this conversation did he indicate to you that he might have any particular interest in this transfer that he suggested?" And you answered, "Yes. He stated he knew the families or the family, at least, of one of the men and it might be to my advantage as well as his if they could be transferred."

You made that answer, didn't you? A. That is right, sir. The two conversations were very close together.

Q. So it is our testimony that the statement about it 729
being to your advantage took place over the telephone? A. I testified this morning that it took place the second time we met.

Q. At Mitchel Field? A. At Mitchel Field.

Q. I am asking you if you want to change that testimony in the light of what I just read you? A. No, because I am not sure now exactly when it did occur, except that it did occur.

730 *John K. Pepper—For Government—Cross.*

Q. It didn't take place twice, did it? A. I don't believe so, sir.

Q. All right. Captain Pepper, you had quite a bit of talk about these two boys with the defendant Major Radovich, didn't you? A. Yes, sir.

Q. You told him, didn't you, that one of the reasons that you objected to these boys being there was, in substance, that you didn't think that——

Mr. Robb: Strike that.

Q. You told him in substance, didn't you, as one of your objections to these boys that they were Jewish, isn't that
731 right? A. I don't recall that, sir. I never make any open statements on that.

Q. Didn't you say to him in substance that that was one of the things about these boys which irritated you and made you interested in their being there? A. I am irritated at anyone who doesn't want to go overseas.

Q. But didn't you say that in substance to Major Radovich? A. I do not recall, sir.

Q. You wouldn't say you didn't, would you? A. No, sir. I would not.

Q. You said you were irritated at anybody who didn't want to go overseas? A. Yes, sir.

Q. Have you had a chance to go overseas? A. Yes, sir, I did.

732 Q. Did you go? A. No, I didn't.

Q. That is all. A. But—just a moment, sir.

Q. All right.

The Court: You may answer the question.

A. I had two chances to go overseas. I asked someone who was going to request me when he arrived, which he did. When the request came I never had a chance to say yes or no, it was turned down by the headquarters, saying

I was more essential on my present job. The second time I was actually placed on orders for a Far Eastern headquarters which is a key position, a very good one, and this investigation and trial have held me here.

Q. When was that second time, Captain? A. This Spring.

Q. This Spring? A. Yes, sir.

Q. Where were you going? A. To Manila.

Q. Manila, Philippine Islands? A. Yes, sir; before the war was over.

Q. Yes, sir. And the first time, when was that? A. Approximately a year preceding.

Q. Where were you going that time? A. I don't know.

Q. I beg pardon? A. I don't know exactly.

Q. You said you asked somebody to request you? A. Yes.

Q. There wasn't anything wrong about that, was there? A. No.

Q. In fact, that is the regular Army routine, isn't it? A. It happens very often, yes, sir.

Q. Surely. One final question, Captain: There wasn't any reason in the world that you knew of why anybody should send you a check for $500, was there? A. No, sir.

Mr. Robb: That is all.

Redirect examination by Mr. McGohey.

Q. Captain Pepper, did you at any time inform any of your superior officers about this $500 check? A. I did not, sir.

Q. After the receipt of it? A. I did not, sir.

Q. Well, you have just testified here that you pleaded guilty to a charge under the 104th Article of War, did you not? A. Well, that was after the investigation started.

Mr. Robb: I can't hear the witness.

(Answer read.)

Q. Prior to the time that you pleaded guilty to this offense under the 104th Article of War, did you speak to any superior officer about this $500 check? A. To the investigating officers only.

Q. I say, to any superior officer? A. To both investigating officers because both represented the headquarters which were superior to me.

Q. Well, when was it that you talked to any of these officers about that check? A. In August '44 I spoke to Mr. Hogan.

Q. About this check? A. Yes, sir.

Q. Now what precisely, if you know, was the specification in support of the charge of violation of the 104th
737 Article of War? A. The only thing I recall about it, sir, is that——

Mr. Robb: Pardon me. If the Court please, I don't think that we ought to retry that particular case here. I object——

The Court: We are not going to retry it. But you have developed the fact.

Mr. Robb: That is correct, sir.

The Court: And I am going to permit him to state the charge. I am not going to have it retried.

Mr. Robb: That is right.

The Court: All right.

The Witness: Under the 104th Article of War I
738 was punished for——

Q. What were you charged with, Captain? A. Well, under the 104th, so far as I know, there are no specific charges—the charge is—the original charges you under a different Article of War and you make a reply by endorsement, and then a decision is made by the commanding general of what action he is going to take as a result of the investigation. Then if he decides——

The Court: Captain, we don't want all that. You were asked the question what was the specification under the 104th Article to which you pleaded guilty. Tell us if you know; but if you don't know, say so.

Mr. McGohey: Maybe I can straighten it out, Judge, with this question.

The Court: All right.

Q. You were originally charged with a violation of the 95th Article of War, a violation of the 96th Article of War? A. Yes, sir.

Q. Then you pleaded to a violation of the 104th Article of War, is that correct? A. That is right, sir.

Q. And under the plea to the 104th Article of War 740
you were given whatever punishment you were given? A. That is right.

Q. But were the specifications in support of the charges that you had violated the 95th and 96th Articles of War? A. The only thing stated in the endorsement to me from the General was that he was punishing me under the 104th Article of War—I can't quite remember the phrase, but the last two words were quibbling and lack of frankness during the investigation.

Q. Quibbling and lack of frankness in answering some questions that were put to you in the investigation? A. That is right, sir; and I can recall the specific question, if you are interested.

Q. No. And that was when? A. I finally received that 741
in February or early March.

Q. No, I mean when; at what time was it charged that you had quibbled? A. During the investigation made by a Major Hogan.

Q. When was that? A. August and September, '44.

Q. Can you recall what question you were asked by Captain Hogan? A. As close as I can recall he asked me this specific question upon which the whole thing hinged

and that was, did I in December, 1943, receive a check for $500 from Major Radovich, to which I answered no.

Q. Was that substantially the— A. That was substantially the question.

Q. The question and the answer. And you have testified here that when you received that check you did not know whether you got it from Major Radovich or not? A. Yes, sir.

Mr. Keenan: That is slightly leading, your Honor.

The Court: And repetitive, too.

Mr. McGohey: Sir?

743 The Court: And repeating, too. I say you are repeating. He has been over that.

Mr. McGohey: Yes. I have no further questions.

The Court: Any further questions?

Recross-examination by Mr. Keenan.

Q. If I understand it, Captain, you never said anything about the $500 check to anyone until Major Hogan of the Intelligence Branch of the Army was interrogating you? A. That is right, sir.

Q. And then he asked you if you got a $500 check from Major Radovich, and you replied in the negative? A. Yes, sir.

Q. Did you volunteer then any information that you did 744 receive a $500 cashier's check? A. He did not permit me to. He went right on to the next question.

Q. Did you volunteer that at any time during the interview? A. Not the first time I saw him, no, sir.

Q. How long did that interview take place between you and Major Hogan, the first time you saw him? A. How long did it last?

Q. About? A. Approximately 20 minutes.

Q. You could have told him if you had wanted to; nothing prevented you from telling him? A. I could have told him lots of things if I wanted to.

Q. Including the receipt of a $500 check? A. Yes, but not one from Major Radovich, as he phrased it.

Q. Didn't the fact when he spoke to you about a $500 check from Major Radovich, didn't it occur to you to say, "No, I didn't get it from Major Radovich, but I got a cashier's check for $500 and I don't know who it was from"? Did that occur to you? A. Yes, it did.

Q. But you didn't so answer? A. No, I did not.

Q. Now, you have been asked the question—I would just like to repeat it and I want to get over it quickly, but I understand you have been asked the question in this court room as to whether or not you said you were irritated because these boys were Jews and you say you couldn't say that you didn't say it. 746

The Court: I am not going to permit first one counsel and then the other to ask the same question.

Mr. Keenan: Your Honor, this is not the same question.

The Court: So far it is the same.

Mr. Keenan: It will not be when I finish.

The Court: Go ahead.

Q. I am asking you if you are in the habit of making statements of that kind so you wouldn't know whether you happened to make it on that occasion or not? 747

Mr. McGohey: I object to that question, your Honor.

The Court: Sustained. It has all been covered and I am not going to permit first one and then the other to ask the same question.

Mr. Keenan: I want to know whether or not——

748 *John K. Pepper—For Government—Recross.*

The Court: He has answered that. I sustain the objection.

Mr. Keenan: Then I will ask another one if the Court will permit me.

Q. Have you made statements about other boys that they irritated you because they were Jews?

Mr. McGohey: I object to that.

The Court: I overrule the objection. You may answer.

A. To the best of my knowledge, no.

749 Q. Well, why is there any doubt about that in your mind today about these boys?

Mr. McGohey: I object to that, your Honor, to this line of questioning. It has no relation to this case at all.

The Court: I will allow that question. All right.

Q. Why is there any doubt in your mind today, as you have expressed there is, whether or not you made that statement about these two boys being Jews and their irritating you? A. Normally I would not say anything like that because I am not open in any prejudice I may or may not have.

750 Q. You are not open about your prejudice? A. And I may or may not be prejudiced.

Mr. Keenan: That is all.

The Court: Any further questions?

Mr. Robb: One further question.

Recross-examination by Mr. Robb.

Q. Captain, you mentioned the endorsement that came to you— A. Yes.

Q. —of this—whatever you call it— A. On the basic communication.

Q. That is it. Basic communication to the 104th Article of War in response to a question by Mr. McGohey. A. Yes, sir.

Q. You said that you were being punished for quibbling. A. Quibbling and lack of frankness.

Q. Captain, what was the punishment possible under the 95th and 96th Articles of War under which you were first charged?

Mr. McGohey: I object to this, your Honor, as immaterial. 752

The Court: Objection sustained.

Mr. Robb: Would the Court hear me on that? May I have an exception?

The Court: I think it is too plain. I sustain the objection.

Anything further?

Mr. Robb: That is all, thank you.

Mr. McGohey: I have no further questions.

The Court: Stand aside. Call the next witness.

EDNA S. GOERTZ, called as a witness on behalf of the Government, being duly sworn, testified as follows: 753

Direct examination by Mr. McGohey.

Q. Miss Goertz, will you please try to keep your voice up so that the last juror in the box and all of counsel and the defendants at this side of the table can hear you.

By whom are you employed, Miss Goertz? A. Headquarters Army Air Forces, Washington, D. C.

754 *Edna S. Goertz—For Government—Direct.*

Q. Will you please try to be just a little more forceful so that everybody can hear you. How long have you been employed in your present capacity? A. Three and a half years.

Q. Three and a half years? A. Yes, sir.

Q. You were employed, then, in that capacity in the Summer of 1943, were you not? A. Yes, sir.

Q. Now, do you know the defendant Major Radovich? A. Yes, sir, I do.

Q. He is here in the court room, is he not? A. Yes, sir.

Q. That is the officer sitting at the righthand side of the table? A. Yes, sir.

755 Q. Can you tell me when it was you first met the Major? A. The latter part of August of 1943.

Q. And where? A. In my office.

Q. At your office in Washington? A. Yes, sir.

Q. What officer was your immediate superior? A. Colonel Goetz.

Q. Colonel Goetz? A. Yes, sir.

Q. How do you spell that? G-o-e-t-z? A. Right.

Q. And do you know what the Colonel's duty assignment was at that time? A. He was Chief of Foreign Assignments Branch.

Q. The Chief of the Foreign Assignments Branch of the Army Air Forces? A. Of Military Personnel Division, Assistant Air Staff Personnel.

756 Mr. Keenan: I can't hear from here.

Mr. McGohey: I think the jurors haven't heard it.

Q. Would you repeat that. A. Foreign Assignment Branch, Military Personnel Division, Assistant Chief of Air Staff Personnel.

Q. Now in the performance of your duties did you have anything to do with the preparation of orders for the transfer of personnel in the Air Forces? A. Yes, sir, I did.

Q. Now directing your attention, in the summer of 1943, to the latter part of July, do you know whether or not there was in the Army Air Forces a project known as Project CA281? A. Yes, sir, I do.

Q. Can you tell us what that project was? A. Well, it turned out later to be the First Air Commando Group.

Q. Was that project number assigned to it for security reasons? A. Yes, sir.

Q. Now in connection with the performance of your duties, did you become familiar with the manner in which the personnel of this First Commando Group was organized? A. Yes, sir, I did.

Q. Who was the head of the group? A. Colonel Phil Cochran. 758

Q. Do you know any other officers that were associated with him? A. Yes, sir, I do.

Q. Was Major Radovich associated with him? A. Yes, sir.

Q. Was there a Colonel Boebel? A. Yes, sir.

Q. Now will you describe to us how the recruiting for that unit was done?

Mr. Keenan: I object to that, your Honor. I think if it is a matter of record we ought to find out, more than from some young lady that apparently worked there in the office.

Mr. McGohey: I think the witness has testified, your Honor, that in the course of her duties she became familiar with it, and she can testify to it of her own knowledge. 759

The Court: I think so. I am going to overrule the objection.

Mr. Keenan: Exception.

Mr. McGohey: May I have that question, please?

Q. (Read.) A. These different officers that were——

Q. You will have to keep your voice up. Even I can't hear you back here. A. These officers that were selected by Colonel Cochran were sent out into the field to get these members for this Air Commando Group on Project CA281, and when they found any officers or enlisted men that were good material for this project, they came in with their names and gave those names to me, and I requested orders on them.

Q. Now did Major Radovich ever come in and give you the names of anybody and request orders for them? A. Yes, sir.

Q. What was your duty when an officer made such a re-
761 quest? Will you tell us just what you did? A. I immediately requested the orders.

Q. Well, now, you requested the orders in what way—orally or did you make any written memorandum? A. They were written R and R's, as we call them in the office.

Q. You made out some kind of written memorandum, and did you transfer that to another section of the Air Force Headquarters? A. Yes, sir; to the Orders Branch.

Q And then do you know what happened to it after that? Do you know what the Orders Branch did in the regular procedure? A. They either wrote the orders or directed some other headquarters to write them. I mean by that, that if another officer or office was in charge of men that had been requested, they would naturally write the orders rather than the Headquarters Army Air Forces.

762

Mr. Ansell: If your Honor please, I don't think my capacity to hear is a fair test and I don't know how I can overcome it; I am only saying to your Honor I cannot hear this witness. I wonder if the reporter might be permitted to read that answer back to me.

The Court: Couldn't you come and sit closer, and use the clerk's desk.

Mr. McGohey: Would you like to come up here and sit in my chair?

(Last question and answer read.)

Q. Now, Miss Goertz, if the man who was being transferred into this group whose name you had received was stationed at a post some distance from Washington, would that transfer be handled by a mail direction to his station or by telephone or by a telegraphic direction? A. Telegraphic. It all depended on the urgency of it.

Q. Were there occasions when the Orders Section of the Army Air Force would send to a camp a telegraphic instruction to the post where the man was stationed directing or requesting the commanding officer of that post to 764 issue orders transferring a man under his command out of his command into the Air Commando Group? A. Yes, sir.

Q. There were occasions when that happened? A. Yes, sir.

Q. Now you testified, I think, that Major Radovich on occasion did come to your office and asked you to prepare requests for orders for certain men in the Armed Forces? A. Yes, sir.

Q. Did he ever on any occasion request you to make out request orders for a private named Martin Bayer? A. Yes, sir.

Q. Did he ever request you to make out request orders for a private named Melvin Usdan? A. Yes, sir. 765

Q. Do you recall about when he made those requests to you? A. The latter part of November, 1943.

Q. Can you give us the date any more closely than that? A. The 22nd of November, if I recall correctly.

Q. I ask you to look at that and see if that refreshes your recollection (handing). Does it? A. Yes, sir.

Q. Now, with your recollection thus refreshed, can you tell us when it was that you issued the orders for those two men? A. On the date of this copy.

Q. What is that date? A. The 22nd of November, 1943.

Q. Did you make out those orders on the same day that you talked to Major Radovich? A. Yes, sir, I did.

Q. Now, thereafter did you have a further conversation with Major Radovich about the same two enlisted men? A. Yes, sir, I did.

Q. Can you tell us when that conversation was? A. The 24 November, 1943.

Q. The 24th of November, 1943. That was two days after you had had the first conversation, was it? A. Yes, sir.

Q. Will you tell us what the conversation was that you
767 had with Major Radovich on that day?

Mr. Keenan: And where it took place.

Mr. McGohey: Yes. I will withdraw that question.

Q. The first conversation you had with Major Radovich, was that a personal conversation in your office? A. Yes, sir, it was.

Q. Now when you talked to Major Radovich two days later, on the 24th, was that a personal conversation? A. No, sir, it wasn't.

Q. Well, was it by telephone? A. Telephone, yes, sir.

Q. Do you know where Major Radovich was telephoning from? A. Goldsboro, North Carolina.

Q. You talked to him on the telephone? A. Yes, sir.

768 Q. Will you tell us what the conversation was? A. He said the project was up to strength, that these two enlisted men were not needed——

The Court: He said what?

The Witness: The project was up to strength and these two enlisted men were not needed, and would I please request orders to take them off the project and reassign them.

Q. Did he ask you to reassign them to any particular unit? A. Yes, sir.

Q. What unit did he ask you to reassign them to? A. Air Transport Command in Wilmington.

Q. Air Transport Command at Wilmington? A. Yes, sir.

Q. That was not the same organization from which they had come when they went into the commando outfit, was it? A. No, sir.

Q. Now, reverting to the first conversation that you had with Major Radovich on the 22nd of November, 1943, you told us that he asked you to issue orders for the transfer of these men. Was there anything else said in that conversation by Major Radovich? 770

Mr. Keenan: Your Honor, I take it that all these conversations are subject to the same objection?

The Court: It may be so understood. I so understand it. Go ahead.

The Witness: Would you mind repeating that question, Mr. Reporter?

Q. (Read.) A. He asked me to assign these men to the project as a favor of——

Q. I can't hear you. A. He asked me to assign these two enlisted men to the project as a favor to a friend.

Q. As a favor to a friend? A. Yes, sir.

771

Mr. McGohey: I have no further questions of the witness.

The Court: Do you wish to cross-examine?

Cross-examination by Mr. Keenan.

Q. Ordinarily I don't like to ask this question of a lady, but I am sure you won't object. What is your age? A. 25.

Q. 25. And you have been three and a half years in the service? A. Yes, sir.

Q. You had a good deal of authority in that commando unit, didn't you? A. To a certain degree, yes, sir.

Q. You could order men around about where you wanted, in substance, couldn't you? A. To a certain degree, yes, sir.

Q. Well, to the degree that they went where you told them to go, is that correct? A. Well, some I wrote the orders, I mean I requested the orders; I wrote them myself.

Q. You wrote them yourself? A. But Colonel Goetz always signed them, and if he disapproved he didn't sign them.

773

Q. Well, did Colonel Goetz always sign the orders you gave him to sign? A. Yes, sir, I believe he did.

Q. I can understand that. Now, what was your rank? A. My rank, sir?

Q. Yes. A. I was CF3 at the time.

Q. What is CF3, please? A. That is a civil service rating.

Q. Civil service rating? A. Yes, sir.

Q. Well, that is the same as a lot of the clerks here in this court house, and all over the United States, a civil service rating—CF3? A. CAF3.

Q. What was the pay range of that? A. That was 1620.

Q. 1620?

Mr. McGohey: I object to this line of questioning.

774

Mr. Keenan: I will not pursue it.

Mr. McGohey: It has no materiality to this issue.

Mr. Keenan: It is rather astounding to me.

Mr. McGohey: I move to strike out the comment.

Mr. Keenan: I am sorry, I beg your pardon. I apologize for that statement, your Honor. I am sorry. I made it.

The Court: All right.

Q. You have given some expert—you have given some testimony about how this commando organization operated. Would you sign any officers' names to these orders yourself or would you give the orders to them to sign? A. Well, no, sir, I didn't sign them.

Q. You didn't sign them. Was that the first you ever heard of these two boys, Bayon and Usdan, on the 22nd of November, 1943? A. Yes, sir.

Q. Never heard of them before? A. No, sir.

Q. But did you have any discretion of your own, Miss Goertz, in what you were doing there; did you have any real authority or were you just—and I don't say this in an impertinent fashion, but were you just a clerk at $1650 like a lot of other clerks were? 776

Mr. McGohey: I move to strike out this reference to salaries. We are getting back to that question and I think that was taken care of.

Mr. Keenan: And I will withdraw that question.

Q. Did you have any authority in your position? Oh, what was your authority? A. I was Colonel Goetz's secretary.

Q. And that is where you got your authority? A. Yes, sir.

Q. You didn't know of your own knowledge how this unit operated, did you? A. No, sir, not fully, no, sir.

Q. Then, by the way, no one offered you any money for issuing this order? A. No, sir. 777

Q. But, as you understood it, Captain Radovich—by the way, was he Captain or Major at that time? A. He was Captain at that time.

Q. Do you know the Captain very well? Were you pretty good friends? A. We were friends, yes, sir.

Q. Was he stationed at Washington then? A. Yes, sir.

Q. Did you see him from time to time visiting in Washington, socially?

Mr. McGohey: I object to that, your Honor, as being immaterial.

The Court: Objection overruled.

Q. You never were a WAC, were you? A. No, sir.

Q. Did they have the WACs around where you worked? A. No, sir.

Mr. Keenan: I think that is all.

Mr. Robb: I have just a few questions.

779 The Court: All right.

Cross-examination by Mr. Robb.

Q. Miss Goertz, as I understand it, there were a number of officers going around the country more or less as scouts lining up people for this project, wasn't that it? A. That is right, sir.

Q. When they found somebody they would get in touch with you and you would make the arrangements to transfer them, was that it? A. That is right, sir.

Q. So there wasn't anything unusual in this call you got from Major Radovich asking to have them transferred, was there? A. Not at all, sir.

780 Q. Other officers were making calls to you about transfers, too, isn't that right? A. That is right.

Q. As a matter of fact, other officers asked to have men transferred into the organization because they knew the men, didn't they? A. That is right.

Q. This was going to be a rather choice group, wasn't it? A. That is right.

Q. So that officers naturally would get any man that they knew, isn't that right? A. Right, sir.

Q. Mr. Keenan asked you if you knew the Major and were a friend of his. All these officers in the group used to come to your office, didn't they? A. Yes, sir.

Q. And I suppose, like aviators, they always had something to say to you, and all that, didn't they? A. Yes, sir.

Q. And, Miss Goertz, there were other men moved in the organization and moved out, weren't there? A. Yes, sir, they were.

Q. Men moved into this Air Commando Group and then moved out? A. Yes, sir.

Q. So that wasn't unusual either, was it? A. No, sir.

782

Mr. Robb: I think that is all. Thank you very much.

The Court: You may stand aside. The Court is going to take a recess. The Court will take a ten-minute recess.

(Short recess.)

RICHARD W. BOEBEL, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. What is your rank? A. Lieutenant Colonel.

Q. You are a member of the United States Army Air Corps? A. Yes, sir. 783

Q. What is your present assignment, Colonel? A. I am commanding officer of an Army Air Force, Convalescent Hospital, at Pawling, New York.

Q. Prior to that time what was your assignment? A. I had three alert plane squadrons in Colonel Cochran's First Air Commando Group.

Q. You served with that unit in the China-Burma-India theatre, did you not? A. Yes, sir.

Q. During what period? A. From November, 1943 to December, 1944.

Q. How did you come to join the Air Commando Group? A. You mean, under what circumstances?

Q. Yes. A. I was at the Commanding General Staff School at Fort Leavenworth and was requested by Colonel Cochran to join the organization. I was asked whether I wanted to or not, and I told him that I did; and received orders subsequent to that transferring me to the First Air Commando Group, known then as Project CA 281 I believe it was.

Q. Where were you stationed after that transfer? A. I
785 was sent first to Washington and from there to Goldsboro, North Carolina.

Q. Would you just keep your voice up a little more, Colonel, so that all in the jury and counsel for the defendants over on the right can hear you clearly? A. Yes, sir, I will.

Q. Now at one time in your service, Colonel, were you stationed at Mitchel Field? A. Yes, sir, I was. Did you say at what time?

Q. When were you at Mitchel Field? A. From January, 1941, until November of that year.

Q. Well, in the spring of 1943 were you at Mitchel Field then? A. Yes, sir, I was.

Q. What was your duty assignment at that time? A. I was Base Adjutant.

786 Q. At any time were you a member of the First Fighter Command? A. No, sir, I wasn't.

Q. While you were at Mitchel Field did you know the defendant Major Radovich? A. Yes, sir, I did.

Q. While you were at Mitchel Field did you have under your command in your unit two soldiers named Private Bayer and Private Usdan? A. Yes, sir, I did.

Q. Did there come a time when those men were transferred out of your organization? A. Yes, sir.

Q. Do you know where they were transferred to? A. They were transferred to Headquarters Squadron First Fighter Command.

Q. Prior to their transfer, did you have a conversation with anybody with respect to that transfer? A. Yes, sir, I did.

Q. With whom? A. Colonel Jacobson.

Q. Now, after those two men, Private Bayer and Private Usdan, were transferred out of your organization at Mitchel Field, did you ever see them again? A. Yes, sir, I did.

Q. And where? A. At Seymour Johnson Field, Goldsboro, North Carolina.

Q. That is when you were down there with the First Air Commando Group? A. Yes, sir. 788

Q. And when was that? A. That was in November of 1943.

Q. Now what was your duty assignment with the Air Commando Group at the time that these men arrived? A. I was Adjutant.

Q. And when these men came, did they report to you? A. Yes, sir, they did.

Q. Did you have a conversation with them? A. Yes, sir, I did.

Q. Did you inquire of them how they came to come into that outfit? A. Yes, sir, I did.

Q. What did they say?

Mr. Robb: We object. 789

The Court: I sustain that objection.

Q. You did have a conversation with them? A. Yes, sir, I did.

Q. In that conversation did the name of Major Radovich occur?

Mr. Robb: I object.

Mr. Keenan: Just a minute. I haven't any objection to the giving of the entire conversation, as representing the two Bayers. I wish he would. But certainly if he is not permitted to give it entirely I don't think that Mr. McGohey wants to pick out something that would leave a wrongful influence in the jury's mind.

Mr. McGohey: I will withdraw the question.

The Court: I will direct the jurors to disregard any inference.

Mr. Robb: In view of Mr. Keenan's statement I will withdraw my objection to the question. Let him answer it.

791 Mr. McGohey: I have withdrawn the question, your Honor.

Q. Was Major Radovich at Seymour Johnson Field at the time these men arrived? A. No, sir.

Q. I mean at or about that time; I am not talking about the precise minute that you met them. A. He was there later, yes, sir.

Q. How long later? A. Oh, a day or two.

Q. Now, did you have a conversation with Major Radovich about these two men? A. Yes, sir, I did.

Q. Will you tell us what that conversation was? A. I told Major Radovich two men had arrived, reported to our organization, whose names were Bayer and Usdan. I asked them—I asked Major Radovich why they were as-
792 signed to our organization. He told me that he did it, is a favor to Colonel Jacobson. I told him from previous experience that I had had with these two men I did not think that they were the type we wanted in our organization. He said he would take my word for it and have them transferred out of our organization. That is about the substance of the whole conversation.

Q. Were they subsequently transferred from your organization? A. Yes, sir, they were.

Q. When? With respect to the time they arrived there, when were they transferred out? A. About a week later.

Q. Coming back to the time that the men arrived and you had a conversation with Bayer and Usdan— A. Yes, sir, I did.

Q. Will you tell us now what that conversation was? A. I asked them who had arranged their transfer into our organization. They told me that Major Radovich had. I asked them if they knew this was an entirely volunteer organization. They told me that they did. I asked them if they were the two men who had previously worked for me at Mitchel Field. They told me that they were. And I assigned them to a barracks and they left. 794

Q. And that is the substance of the conversation that you had with them? A. Yes, it is.

Mr. McGohey: I have no further questions.

Cross-examination by Mr. Keenan.

Q. I am not certain, Colonel, that I got your exact language of your statement to Major Radovich about these boys not being the type of men needed, something of that nature. Was that in substance what you told him, or do you mind repeating it? A. No, sir, I don't. What I implied to Major Radovich at the time was——

Q. I would rather you said what you said. I don't object to your—we would like to get the statement—— 795

The Court: Tell us as near as you can. I know you don't remember the exact words, but as near as you can remember the conversation, the words he said and the words you said.

A. I said "Rad, I don't think these are the type of men we want in our organization. They are not the calibre of

man that we are looking for." Whether he asked me to substantiate that and give my reasons for it, I don't remember, but I do know that I told him that I didn't think we wanted them. That is about all, sir.

Q. Now, had you known Martin Bayer previous to this time? A. You mean, did I know him personally, sir?

Q. Yes. A. No, sir, I didn't.

Q. Had you any knowledge as to his character or his conduct as a soldier of the United States Army? A. Yes, sir, I did.

Q. And was that from your own observation? A. No, sir, it was not.

797 Q. Something that you had heard about him from someone else? A. Do I have to answer that yes or no?

Q. Well, you answer it so as to tell the fair sense of the matter. A. Yes.

Q. I won't require a yes or no answer to it.

Mr. Keenan: Let me withdraw it.

Q. Let us get the truth, the full point of it. Was there something wrong with Martin Bayer in your opinion? A. Yes, sir.

Q. You thought he was trying to evade overseas service— A. No, sir, nothing of that sort.

Q. Well, I don't know. Now will you tell the Court and jury just what do you mean by that, why you thought they 798 didn't belong on that outfit, or he didn't belong in that outfit? A. When they were originally transferred from my organization to the Headquarters Squadron, First Fighter Command, a request was made to me for their transfer. Rather than just let the men go, I inquired from my sergeant who was running the file room for whom they worked. The sergeant told me that they were not good clerks for the file room, that they were soldiering on the job and that he couldn't get much work out of them. And it was from

that conversation that I had with the sergeant that I first let the men go and later on formed my opinion of them when they had arrived at Goldsboro.

Mr. Keenan: Will you mark this as a defendant Bayers' exhibit?

(Marked Defendants' Exhibit A for Identification.)

Mr, McGohey: Are you offering it?

Mr. Keenan: I want to show it to him.

Q. I would like to show you this paper marked Defendants' Exhibit A for Identification, and ask you if you recognize what type of communication that is; just whether you do or not, yes or no, without stating what it is or anything further about it? A. Yes, sir, I recognize the type correspondence it is. 800

Q. What would you describe it to be, just stating the type, without stating its contents?

Mr. McGohey: I object to this, your Honor.

The Court: I haven't the slightest idea what the document is. May I see it?

(Witness hands paper to the Court.)

The Court: All right. Now what is your objection?

Mr. McGohey: My objection was to the last question.

The Court: I overrule the objection. 801

Mr. McGohey: If your Honor please, I would like to press it a little bit. I don't think he can describe it without getting into the document itself, and I am going to object to the introduction of the document. May we come to the bench for a minute, your Honor, where I can more fully explain my objection?

The Court: Yes.

(Conference at the bench between Court and counsel out of hearing of the reporter.)

The Court: I am going to overrule the objection.

Q. (Question read.) A. May I have that again, sir. (Paper handed to witness.) Its subject is commendation.

Q. Whom does it concern?

Mr. McGohey: I object, your Honor, to any reference to the contents of it unless it is in evidence.

Mr. Keenan: Well, I will offer it in evidence at this time.

The Court: All right.

803 Mr. McGohey: Now, your Honor, I object to its introduction on the ground that it is incompetent.

The Court: I will permit its introduction.

Mr. McGohey: Your Honor, there is no way of knowing who signed it, whether it is official or what it is.

The Court: It has a signature on it.

Mr. McGohey: Whose signature?

Mr. Keenan: The young lady who testified here before.

Mr. McGohey: She testified. The lady was here herself and testified as to her own knowledge. This is a document that we have no way of knowing where it is from or who signed it or anything else.

804 Mr. Keenan: It purports to come from headquarters——

Mr. McGohey: I object to that, your Honor.

The Court: I am going to admit it. It may be admitted.

(Defendants' Exhibit A for Identification received in evidence.)

Mr. Keenan: May I read it, your Honor?

The Court: Yes.

(Mr. Keenan reads Defendants' Exhibit A.)

Q. I will ask you if you know that Lieutenant Colonal (referring to Exhibit A)? A. No, sir, I don't.

Q. I will ask you, in the light of that communication, if that wouldn't describe this Private Martin Bayer as being a valuable and energetic and efficient member of the United States Army within the service group?

Mr. McGohey: I object to that, if your Honor please; the document speaks for itself.

The Court: Sustained.

Mr. Keenan: I think that is true.

Q. Major, as far as your own observation is concerned, you saw nothing wrong with the conduct of either one of 806 these two boys, did you? A. No, sir.

Q. And all they told you was that they came there as a result of Major Radovich's—in substance—some action on his part, is that correct? A. You are talking about my experience in Goldsboro, now?

Q. That is right, yes. A. Yes, that is true.

Q. Did they say anything more about it than that? A. No, sir.

Q. Your subsequent investigation caused you to conclude that they told you the truth when that statement was made to you? A. What statement are you speaking of, sir?

Q. The statement that the Bayer boy made to you when he said he came to Goldsboro because of some action of 807 Captain Radovich or Major Radovich. A. What is your next question?

Q. That is true, isn't it? A. You mean is the fact the fact?

Q. Yes. A. I do not know, sir.

Q. You don't know. By the way, you have used the term "voluntary" with reference to the Commando outfit to which these boys were assigned? A. Yes.

Q. And you told them, if I understood you, that it was voluntary? A. That is right, sir.

Q. And that they didn't need to serve unless they wanted to, is that correct? A. Yes, sir.

Q. Did either one of them state to you that he didn't want to? A. No, sir.

Q. Or anything in substance that would cause you to so believe that, from anything either one of these boys said to you? I am saying, if they didn't use the exact language, I am asking you was there anything that they said that caused you to conclude from their statement that they didn't want to serve in that Commando outfit? A. There
809 was nothing.

Mr. Keenan: That is all.

Cross-examination by Mr. Robb.

Q. Colonel, if these boys had wanted to get out of the organization, all they had to do was just say so, is that it? A. That is right, sir.

Q. Now, Colonel, let me get something straight here. When you first knew these boys they were working as clerks in your organization out here at Mitchel Field, is that right? A. Yes, sir.

Q. And what was your particular organization? A. First Base Headquarters and Air Base Squadron.

810 Q. And they were transferred out of there to where? A. Headquarters Squadron, First Fighter Command.

Q. Who was in command of that squadron to which they were transferred from you? A. I don't remember, sir.

Q. Now, who ordered that transfer, who arranged it? I will put it this way, Colonel: that was arranged by this same Colonel Jacobson that you mentioned, wasn't it? A. Yes, sir.

Q. He is the same one that you mentioned in connection with your talk down at Goldsboro when Major Radovich

said that he had done something as a favor for Colonel Jacobson, is that right? A. That is right, sir.

Q. What was his job, Colonel Jacobson's job? A. At the time of the transfer he was Commandant of the Headquarters Building, First Fighter Command.

Q. Was he a full Colonel or Lieutenant Colonel? A. Lieutenant Colonel.

Q. Who was his superior, do you remember? A. At the time he was Commandant of the Headquarters Building—

Q. Yes, sir. A. The Commanding General of the First Air Force.

Q. And he is the same Colonel Jacobson— A. I beg your pardon. Commanding General of the First Fighter 812
Command.

Q. He is the same Colonel Jacobson who was mentioned as being the assistant to Colonel Vidal, is that right; he was at one time Colonel Vidal's assistant? A. Yes, he was.

Q. Colonel, you testified that you knew the defendant Radovich out at Mitchel Field. Had you known him up to that time—prior to that time at all? A. What time are you talking about at Mitchel Field?

Q. The time you met him at Mitchel Field. Had you known him before you got to Mitchel Field? A. No, sir.

Q. In other words, you first met him in the Army? A. That is right, sir.

Q. And after you left Mitchel Field you went to Burma with this Air Commando Group? A. Well, yes, that is substantially correct. 813

Q. He was along in that group, wasn't he, sir? A. Yes, he was.

Q. And you were the adjutant of the group? A. Yes, at the time we left the States.

Q. Pardon? A. Yes, I was.

Q. You served throughout that campaign? A. Yes, sir, I did.

Q. What was your group's mission out there? A. We were air support for General Wingate's ground army.

Q. What did you do, Colonel? I am trying to find out out what your particular function was. A. We supplied all the air support that a ground army would normally need; we took his troops into Burma, supported them by air power while they were in there, evacuated their wounded, and dropped supplies to them.

Q. I suppose you shot up Jap supply trains? A. Yes, we did.

Q. And personnel? A. Yes, sir.

Q. Air fields. I believe your group was the one that
815 introduced this so-called low level bombing out there? A. We introduced it in that theatre, yes, sir.

Q. How many men were in your group, Colonel? A. About 520.

The Court: This is extremely interesting and I would love to pursue it personally, but I can't see its materiality to any issue.

Mr. Robb: I am just about through, if the Court please. One further question.

Q. You received several medals for your part in that work? A. A few, yes, sir.

Q. So did the Major, didn't he, Major Radovich? A. Yes, he did.

816 Q. D.F.C. and British D.F.C.? A. Right.

Q. In fact, he got two D.F.C.'s, didn't he? A. Two American D.F.C.'s.

Q. And one British? A. Yes.

Q. For gallant conduct? A. Yes, sir.

Q. You got one American and one British, didn't you, sir? A. Yes, I did.

Q. And you knew Major Radovich intimately during that time, didn't you? A. Yes, I did.

Q. A good soldier, wasn't he? A. Very good.

Q. He had an excellent reputation? A. The best.

Q. Pardon me. The best, you say? A. The best, yes, sir.

Q. Not only a good soldier but an excellent one, isn't that right? A. He certainly was.

Q. Colonel, when you talked to Major Radovich down there at Goldsboro about these men, was it understood that you were telling him to get those men out of there? A. Right.

Q. It was an order, not in formal shape, but it was supposed to be a direction, wasn't it? A. Well, it could have been interpreted that way. 818

Mr. Robb: I think that is all. Thank you.

The Court: You may step down. Call the next witness.

EDWARD M. KOGAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Wallace.

Q. Captain Kogan, you will have to keep your voice up so that counsel at this table can hear you. Captain Kogan, you are in the United States Army, are you not? A. I am. 819

Q. How long have you been in the Army? A. Nine years.

Q. When did you first enlist in the United States Army? A. 1936—October, 1936.

Q. As a private? A. As a private.

Q. Did you see service then in 1936? A. Yes, sir, I went to Panama in 1936.

Q. You will have to talk louder, Captain. A. I went to Panama in 1936.

Q. When were you first assigned to Mitchel Field? A. October, 1939.

Q. Have you received various promotions through the rank of master sergeant and then commissioned to first lieutenant and then now as a captain of the United States Army? A. I did, sir.

Q. Where are you assigned right now? A. Fifth Air Force Service Command.

Q. Where is that located? A. Tokyo.

Q. Were you stationed at Mitchel Field in the years 1942
821 and 1943? A. I was, sir.

Q. Do you know the defendant Samuel Bayer? A. I do.

Q. Do you see him in the courtroom? A. Yes, sir, sitting right over there.

Q. Do you know Elias Bayer? A. I know him by sight, sir.

Q. Do you see him in the courtroom? A. Yes, sir.

Q. Do you know Major Radovich? A. I know Major Radovich by sight, sir, too.

Q. You never spoke to him?

Mr. Robb: I did not get that. Speak louder.

The Witness: I know him by sight, sir.

Mr. McGohey: May the witness keep his voice up? Even I have difficulty hearing him here.

822

Q. When did you first meet the defendant Samuel Bayer? A. 1942—spring of 1942.

Q. Could you tell us the circumstances under which you met him? A. I met Mr. Bayer through his oldest son, Robert. Shortly before I met Mr. Bayer my wife had had a baby and I met Mr. Bayer shortly thereafter; he came to my home with his son Robert.

Q. Was Robert in the Army then? A. He was, sir.

Q. What was his rank or rating? A. He was a private.

Q. What were you at the time? A. Master sergeant.

Q. Were you both at Mitchel Field? A. We were, sir.

Q. Did you ever meet Samuel Bayer's other son, Martin Bayer? A. I did, sir.

Q. When did you first meet him? A. In the summer of 1942.

Q. Where? A. I met him first at Mr. Bayer's home, Far Rockaway.

Q. Did you ever have any discussion with Samuel Bayer regarding Martin Bayer? A. Yes, sir.

Q. Where? A. The first occasion was at Mr. Bayer's home, that summer, 1942.

824

Q. Will you tell us what he said to you and what you said to him?

Mr. Keenan: Just a minute. I object, your Honor, as not material to this inquiry.

The Court: When is this, now? Summer of 1942? I sustain that objection; too remote.

Q. Just what months do you refer to when you say the summer of 1942? A. Late summer—about August or September.

Q. Could have been in September of 1942? A. September of 1942. I think it was very possible it was around that time.

825

The Court: I shall overrule the objection.

Mr. Keenan: Exception.

Q. Will you tell us what that conversation was? A. My wife and I were visiting Mr. Bayer and his family at his home and we were talking about Martin going to the Roosevelt School of Aviation Mechanics, and Mr. Bayer asked me if, when he graduated that school, if he would

be eligible for enlistment in the Air Corps, and our conversation was just about that subject.

Q. Do you recall anything else that was said at that time? A. Well, Mr. Bayer said he would like to get Martin into the Air Corps just as his older boy Robert did at the time.

Q. Did he say anything else that you recall? A. I believe he asked me if he could get to Mitchel Field; would it be possible he would be enlisted for the Air Corps at Mitchel Field.

Q. Did he say anything else that you can recall? A. No, nothing else I can remember at that time.

827 Q. Do you recall whether any other branch of the Army was mentioned at that time? A. Not at that occasion.

Q. Well, did there come a time when there was some mention of some other branch of the Army? A. Yes, sir, later that year, early December.

Q. Did you have a conversation with Samuel Bayer in early December of 1942? A. I did, sir.

Q. Where did that conversation take place? A. On the telephone, sir.

Q. Where were you? A. I was in my office, sir.

Q. Will you tell us what that conversation was?

Mr. Keenan: This we object to, too, if your Honor please.

The Court: Objection overruled. Go ahead.

828

A. Mr. Bayer called me and asked me if I knew that all enlistments in the Army were going to be closed on the 15th of December. I told him I did. He asked me what happened to most of the boys who were inducted, what branch of the service they went into. I told him that in my opinion the bulk of inductions went to the infantry. He said, "Well, if Martin could get enlisted now, do you think it is still possible for him to get in the Air Corps?"

I told him I thought they could. That was about the gist of the conversation at that time.

Q. Do you recall whether there was anything else said about the infantry by Samuel Bayer at that time? A. Well, Mr. Bayer made it very clear that he wanted his boy in the Air Corps rather than the infantry; he preferred him to be in the Air Corps rather than the infantry.

Q. What part of the Air Corps, do you recall? A. Well, as ground crew, I think.

Q. Did Martin Bayer then enlist in the Army? A. Yes, he did.

Q. Do you know where he was assigned when he enlisted? A. He eventually came to Mitchel Field. Enlisted 830
at Grand Central Palace and eventually arrived at Mitchel Field, via Camp Upton.

Q. How long after he enlisted did he arrive at Mitchel Field? A. I would say ten days.

Q. Where did he take his basic training? A. I believe he took it at Mitchel Field.

Q. In the early part of 1943 you were out at Mitchel Field, weren't you? A. That's right, sir.

Q. Do you know the organization commonly known as the Waes? A. I do, sir.

Q. Were they taking over any duties at Mitchel Field at that time? A. They had not arrived as yet. We were expecting our first shipment of Waes at that time.

Q. Where were those Waes to be assigned when they arrived at Mitchel Field? A. Various administrative offices 831
throughout the field.

Q. You had a base headquarters and you had the headquarters of the First Fighter Command and First Bomber Command, you had some other headquarters, too, stationed at Mitchel Field, is that right? A. That is right, sir.

Q. Were the Waes going into all those headquarters, or were they going into one or more? A. Going into all of them, sir.

Q. Now, what sort of jobs were they taking over at that time? A. Clerical jobs.

Q. In March of 1943, do you recall any conversation you had with Samuel Bayer? A. I do, sir.

Q. Where did that conversation take place? A. In my home.

Q. Will you tell us the substance of that conversation? A. Mr. Bayer told me that his brother had met quite a few officers from the First Fighter Command, that they had become very friendly, and one officer, Colonel Jacobson, had recommended that the boys be transferred to work for him over in the Fighter Command, that it was
833 a good assignment and looked good for a while.

Q. Did he say anything else to you? A. Well, he asked me what I thought of that recommendation of the Colonel's over there. I told Mr. Bayer that I thought it was a very poor deal to get into, get involved in, and I did not think anybody could promise anybody where they could be because they never knew the next day where they would be themselves.

Q. Had he said something about somebody promising him where people would be? A. Yes, sir.

Q. What did he say? A. He said Colonel Jacobson had promised him that it was a good assignment for about a year.

Mr. Robb: I did not get that.

834 Mr. Wallace: Will you read the answer?

(Answer read.)

Q. Did you have any other discussion with Samuel Bayer at that time, that you recall? A. No, sir.

Q. Do you recall whether there was any mention of rumors in that conversation? A. I believe Mr. Bayer mentioned to me that one of—one of his points mentioned was that he had heard the rumor the Waes were coming

to Mitchel Field; that that was the reason he was interested in getting the boys transferred to the Fighter Command.

Q. Do you recall whether there was any mention of any other rumors in that conversation? A. No, I do not, sir.

Q. Captain Kogan, I refer you to this——

Mr. Robb: Just a minute. If the Court please, we object to this. If Mr. Wallace wants to impeach his own witness, there is a certain way he can do it.

Mr. Wallace: I am not trying to impeach him.

The Court: Let me see it.

Mr. Wallace: Your Honor, I would like to be heard in this matter. The witness says he doesn't recall. 836

The Court: I understand.

Mr. Wallace: I am merely trying to refresh his recollection, not trying to impeach him at all. In that connection I think I would be entitled to show the witness anything, if it would refresh his recollection.

(Sidebar discussion out of hearing of the jury between the Court and Mr. Wallace.)

The Court: I will not permit you to read it, but I will permit you to show it to the witness and ask him if that refreshes his recollection. Do you wish to except?

Mr. Robb: No, sir.

837

Q. Captain, will you look——

Mr. Robb: May I see it too, your Honor?

Mr. Wallace: Surely.

Q. Captain, will you look at this piece of paper, and I direct your attention to the middle of the page, and after reading the part I am pointing to, tell me, yes or no,

whether that refreshes your recollection. A. That refreshes my memory all right, but——

Q. Just one moment. It does refresh your recollection? A. Yes.

Mr. Keenan: I insist. I think the witness ought to be permitted to answer the question.

The Court: I am going to permit him to answer further, after he says it refreshes his recollection. He says it does. Do you wish to show him anything else?

Mr. Wallace: No.

839 Mr. Keenan: Could we know what has been shown to him?

The Court: Yes.

Mr. Wallace: Surely.

The Court: All right. You said it did refresh your recollection, and then you started to add something to it. Go ahead and say whatever you wanted to say.

The Witness: That did not come on that visit, though.

Q. Didn't come on that visit? A. No, sir.

Q. Did you have a subsequent visit or talk, conversation, with Samuel Bayer about Martin Bayer? A. That came later, late that summer, I believe, sir. At that time—first I had a telephone conversation with Mr. Bayer, and Mr.
840 Bayer called me and asked me if I knew of an investigation going on at the Fighter Command, to which I told him, since I had no connection with the Fighter Command, I knew of no investigation.

A few days later Mr. Bayer came to my house again and told me that quite a bit of trouble was going on over at the Fighter Command and he asked me at that time if I felt that there was going to be any consequences of this investigation. I told Mr. Bayer at that time that there

were many wild rumors going around the Field as to entertainment and gifts and stuff of that nature, and that I thought the best thing he could do was to leave well enough be.

Q. Is that what you said, "entertainment, gifts and things of that nature," or were your remarks more ample? A. Well, I don't quite understand you.

Q. Can you give us the conversation as best you can remember it?

Mr. Keenan: If your Honor please, I will object to this witness giving a statement of what he said at an unnamed—undesignated period of time, other than at some time later, concerning a highly volatile subject matter, rumors, in a criminal prosecution. I object to it. 842

The Court: Can you fix the time of the conversation you are talking about, Captain?

The Witness: I would say it was about August, 1943.

The Court: The conversation was with the defendant Samuel Bayer?

The Witness: Yes, sir.

The Court: All right, go on and state——

Mr. Keenan: Exception.

Mr. Robb: If the Court please——

The Court (continuing): ——what you said to him and what he said to you at that time. 843

Mr. Robb: If the Court please, may I interpose an objection at this point upon the ground that the witness has been asked a question and I think he has answered it fully. Apparently the answer did not suit my friend Mr. Wallace, who apparently now is undertaking to further cross-examine the witness. I don't think he should be allowed to do that.

The Court: I don't think he is cross-examining. Overruled. Exception may be noted.

Mr. Robb: Noted.

Mr. Wallace: Will you read—I think I will put another question.

The Court: All right.

Q. Can you remember where this conversation took place to which you were just referring? A. At my home, sir.

Q. When did it take place? A. I would say, as near as I can remember, August, 1943.

Q. Who was present? A. In my home, sir, or at the
845 conversation?

Q. Who was present, first of all, in your home? A. Mrs. Bayer, my wife, and Mr. Bayer's secretary, Mrs. Solomon.

Q. Was this a general conversation in which all these people were involved? A. No, sir.

Q. Was there a conversation just between you and Mr. Bayer? A. Just between Mr. Bayer and myself.

Q. Who made the statement about entertainment and gifts, you or Mr. Bayer? A. I did, sir.

Q. What did Mr. Bayer say, if anything, when you made that statement? A. I don't recall Mr. Bayer denying it or affirming it or saying anything about it.

Q. Was there any mention of uniforms in that conversation? A. Yes, sir; Mr. Bayer, in referring to this investi-
846 gation, referred to a Captain Engelhardt, who, he told me, had pressed a complaint about the uniforms. It seems Captain Engelhardt got a bill for a uniform and he complained about it. That is the story that was told to me by Mr. Bayer.

Q. Did he say whom Captain Engelhardt complained to about getting a bill? A. No, sir, he did not.

Q. When was the next time that you heard from Mr. Bayer? A. I would say about September, 1943—late September.

Q. Was this a conversation you had on the phone or in person? A. He came to my home after a telephone conversation. He asked me if he could come over.

Q. Just a minute. You first had a telephone conversation? A. That's right.

Q. Will you tell us what that telephone conversation was? A. Mr. Bayer told me that his son Martin and his nephew Melvin had been transferred from Mitchel Field and that he had just come back from leaving Martin at Bradley Field.

Q. Did he say where Melvin Usdan had been transferred to? A. To Westover Field.

Q. What else did he say? What else did he have to say on the telephone? A. Nothing that I can point out. 818

Q. Did he say he wanted to meet you? A. Oh, yes, he said he wanted to see me at my home.

Q. How long thereafter did he come to your home? Was it the same day or the same evening? A. I would say it was a few days later.

Q. Did he come alone? A. No, he came with his son Robert.

Q. Did you have a conversation with him at your home? A. I did, sir.

Q. Will you tell us what that conversation was?

Mr. Keenan: May we have the date of it fixed as nearly as possible?

The Court: When was it? 819

The Witness: I would say this was around September, 1943—late September, 1943.

A. Mr. Bayer told me at that time that Martin was in an alerted unit for overseas at Bradley Field, the Aviation Engineers, and he asked my opinion, if I thought there would be any trouble if the boys—that boy, his son there, was transferred away from there. I tried to tell Mr. Bayer

at that time that I thought there would be very serious consequences, and Mr. Bayer cried and——

Q. What did he say? A. Well, the gist of what he said was he wanted him out of that alerted unit for overseas into another unit.

Q. Did he say what kind of a unit he wanted him into? A. I don't get what you mean, Mr. Wallace.

Q. Did he say he wanted him into a unit that was not going overseas?

Mr. Keenan: I think that is wrong.

The Court: I sustain the objection to that.

851 Q. Can you recall anything else that was said at that conversation? A. No, I do not, sir.

Q. Did Robert Bayer have anything to say to Samuel Bayer at that time? A. He did, sir.

Q. What did he say? A. He told his father he thought he was making a mistake being involved in any further trouble with his other son.

Q. Was there any explanation of what this other trouble was?

Mr. Keenan: I object and ask that counsel be cautioned to ask for conversations from the witness, so we get the testimony from the witness.

The Court: That is offensive to me. I sustain that

852 objection.

Q. Do you recall anything else that was said at this conversation? A. I cannot recall.

Q. Do you recall anything else that you said in that conversation? A. Other than what I have said, I cannot. Other than what I have said, I cannot.

Q. I refer you to this page——

Mr. Keenan: I think it is a plain effort to impeach the witness.

The Court: I don't—let me see—I don't know yet what he has.

Mr. Keenan: I am sorry.

Mr. Wallace: Referring to this paragraph (indicating).

The Court: I think you have covered that already. I think the witness in his testimony covered that.

Have you much more direct examination?

Mr. Wallace: Yes, your Honor, I have.

The Court: I think we had better quit. I had hoped that possibly we could have finished his direct examination this afternoon, but inasmuch as there will be cross-examination, I think it is a very good point to stop at right now.

Mr. Robb: If the Court please, might the witness be instructed not to discuss his testimony with anybody?

The Court: I am going to. There are two or three things I want to say. I will do that first.

Captain, I want you to be here to resume the stand first thing tomorrow morning, which is going to be at 10 o'clock.

The Witness: Right, sir.

The Court: Ladies and gentlemen and counsel, tomorrow I am going home in the afternoon. Consequently, there will be no court in this case after lunchtime. We will adjourn tomorrow afternoon at one. Inasmuch as there will be no court in the afternoon and you will be excused at lunchtime, I am going to ask you to be here at 10 o'clock in the morning, instead of 10.30, and you may make your plans accordingly.

Captain, I have already told you to come back, and I will tell you further, that between now and then do not discuss this case with anyone or permit anyone to

discuss it with you. You will resume the stand and finish your testimony without discussing it with either side.

We will take a recess. Court will adjourn until 10 o'clock tomorrow morning.

(Adjourned to October 5, 1945, at 10 A. M.)

New York, October 5, 1945,
10 A. M.

857 TRIAL RESUMED.

EDWARD M. KOGAN resumed the stand.

Mr. McGohey: Do you want to go up now?

Mr. Keenan: Yes.

(Discussion at the bench out of hearing of the jury.)

Direct examination (continued) by Mr. Wallace.

Q. Captain Kogan, I think that when we had suspended yesterday afternoon you had told us about a conversation had in your apartment at which Samuel Bayer, Robert Bayer and yourself were present? A. That is right, sir.

Q. Have you told us all that you remember about that
858 conversation? A. I believe I did, sir.

Q. As I recall your testimony, that conversation took place some time in September, wasn't it? A. That's right, sir.

Q. Of 1943? A. That's right, sir.

Q. You will have to speak louder, Captain. A. That is right, sir.

Q. In the succeeding months of 1943 and 1944 did you occasionally see Samuel Bayer? A. I did, sir.

Q. Did you visit in his home and he visit in your home? A. I would say yes, sir.

Q. Did you go out socially at times? A. We did, sir.

Q. By the way, were you ever the recipient of any gifts from Samuel Bayer? A. Myself, sir?

Q. Yes. A. No, sir.

Q. Any members of your family? A. My children.

Q. During those succeeding months, after this conversation, do you recall whether there ever was any mention of Major Radovich?

Mr. Robb: May we have the date of that, Mr. Wallace?

860

Mr. Wallace: I first want to see whether there was ever any mention, and then I will try to fix the date, if there was.

A. You mean during the entire period I knew Mr. Bayer?

Q. In the months after September, 1943. A. Nothing more than casual reference. I mean nothing specific was ever mentioned.

Q. Do you recall when there were any references to him? A. No, sir.

Q. Do you know: just how did he refer to him, Major Radovich? A. Walter, Rad.

Q. Captain Kogan, do you recall when the Women's Army Corps first came into Mitchel Field? A. I believe it was in the summer of 1943.

861

Q. Do you recall which headquarters they first took over? A. I really don't know that, Mr. Wallace.

Q. Did they take over all the headquarters at the same time or did they take over one headquarters and then take over another headquarters? A. I think the First Air Force received the first contingent of WACs.

Q. The headquarters— A. Headquarters——

Q. —of the First Air Corps? A. —of the First Air Corps.

Q. Do you know when the base headquarters were taken over by the WACs? A. As I remember it, I think that fall, base headquarters started getting WACs.

Q. Do you recall——

Mr. Keenan: In the fall of 1943?

The Witness: In the fall of 1943.

Q. Do you know when the WACs took over the headquarters of the First Fighter Command? A. I would say around the same time.

863

Mr. Robb: Around when?

The Witness: About the same time.

Q. Did they ever take over any of the clerical duties of the medical detachment at the base? A. I believe they have WACs there now.

Q. When did they take that over? A. I really don't know that.

Q. Was it subsequent to taking over clerical duties in the other commands at Mitchel Field?

Mr. Keenan: I object. The witness has said he did not keep track of the WACs, when they went in and out. He answered the question two or three times.

864

The Court: I did not hear the question.

Mr. Keenan: I withdraw the objection.

A. I couldn't tell you that, Mr. Wallace; I don't know.

Mr. Wallace: That is all.

Cross-examination by Mr. Keenan.

Q. Captain Kogan, you have stated that Samuel Bayer gave gifts to your children. Did he provide any uniforms for them? A. For my children?

Q. Yes. A. No, sir.

Q. How many children have you? A. Two.

Q. How old are they? A. My youngest is a year and my oldest is three and a half years.

Q. The gifts were gifts of substance, of money, something of that nature? Could you describe them? A. Articles of clothing or play toys.

Q. Play toys. Did Mrs. Bayer come out to your home? 866
A. Yes.

Q. Did she know Mrs. Kogan? A. Very well, sir.

Q. Without going into details, Captain, were those gifts of any monetary value? Did they run up into any money? A. No.

Q. These toys, were they very expensive mechanical toys, or ordinary toys that would please a child of a year or a year and a half of age? A. I would say they were just of moderate value; nothing——

Q. You say— A. Nothing really expensive. Just gifts of wearing apparel and ordinary baby play toys.

Q. Baby play toys. Were you asked to do anything in particular for the little baby play toys that were given to your infant children? A. No, sir.

Q. Did you understand that there was an implied invi- 867
tation on that account to affect your judgment in what you were doing in the Army? A. No, sir.

Q. Did you take them seriously at all, those little gifts, in any way? A. Well, they were gifts of friendship. I mean at that time we were friendly.

Q. Did you think that someone was trying to corrupt you with those gifts? A. No, sir.

Q. By the way, when Mr. Bayer first met you, you were an enlisted man? A. I was, sir.

Q. And you had the important but still humble duties of an enlisted man to perform at that time? A. I was Base Sergeant Major, Mitchel Field.

Q. May I ask you, did you have anything to do about transferring men from one position to another outside of the Air Force? A. I did, sir.

Q. What was your duty in that regard? A. Well, everybody that was shipped in and out of Mitchel Field went over my desk.

Q. Everybody that was shipped in and out of Mitchel Field went over your desk, and did you have anything to do with transferring these boys, particularly? A. I was
869 no longer at Base Headquarters.

Q. You weren't at Base Headquarters when they were transferred? A. I was in a different command.

Q. You did not have anything to do with that? A. Not a thing.

Q. Will you tell us something about the duties of the clerks out there at Mitchel Field? Were they the type of duties that required the use of typewriters? Tell us a little something about it, if you know. A. There were all types of clerks. What particular type of clerk?

Q. Do you know what type of clerk these boys were? We are centering around Martin Bayer and Melvin Usdan, the son and nephew—a son and a nephew of Samuel Bayer. What did they do? A. While they were at the base I recall they were file clerks.

870 Q. What did that mean? A. They filed all correspondence and kept up all the 201 files on the officers and enlisted men assigned to the base.

Q. We noticed in this file that on one transfer there were twelve different endorsements. Would that indicate that there was a good deal of paper work in the Army to you? A. Yes, sir.

Q. They call that red tape for a good many years back—haven't they, captain, Army red tape? A. Army red tape.

Q. One of the things that has to go on in an army with a lot of records to be kept? A. That's right.

Q. And they have to have them kept and preserved, don't they? A. That is right.

Q. And somebody has to do that work? A. (No answer.)

Q. Now, the men that were clerks, did they have, as far as you could observe, an easy time? Did they work a given number of hours in a day or did they go out and sun themselves in the course of the day? Give us some notion about what a clerk did.

Mr. McGohey: I object to this line of questioning.

The Court: I sustain the objection. 872

Q. I will ask you about how much physical exercise these clerks took, if you can tell us?

Mr. McGohey: I object to that, if your Honor please.

The Court: I will let him answer that.

Mr. McGohey: If he knows.

The Court: Yes. Well, he should know.

The Witness: Would you mind repeating the question?

Mr. McGohey: I suggest that the question ought to be narrowed to the two clerks we are talking about here.

Mr. Keenan: All right. I would like to comply with every wish of the United States Attorney, if I can. 873

Q. Now, the two clerks we are speaking about, the two enlisted men, do you know how much exercise they took, Captain, out there? A. No, sir.

Q. What I am trying to get at is, what the nature of their duties was, whether or not they would be fit for overseas service?

Mr. McGohey: If your Honor please, I suggest that the Captain has said he did not know what they were doing.

The Court: Let him finish his question.

Q. I would like to know whatever light you can throw on that subject by answering the question? Do you know what opportunities those men had to get out on the field and walk around?

Mr. McGohey: I object to this, your Honor. The question is in the form of a summation.

875 Mr. Keenan: I will withdraw it and say:

Q. Can you tell us about the opportunities for exercise of these two men in the course of their duties?

Mr. McGohey: If he knows.

The Court: If you know.

A. I don't know. I wasn't at the base headquarters at that time; I was at a different command headquarters altogether.

Q. But it was on the same field, wasn't it? A. It was on the same field but quite a ways away from base headquarters.

Q. I see. You weren't in direct command over these men
876 at any time? A. No, sir. At no time did I have any jurisdiction over them at all.

Q. At no time would you ever have jurisdiction over them. You had social visits with Samuel Bayer, did you? A. I did, sir.

Q. His wife and your wife? A. I did.

Q. And sometimes Miss Solomon, the girl in his office? A. I did, sir.

Q. She came out there with Mrs. Bayer? A. Very often.

Q. It was a social friendship between your families? A. That is right, sir.

Q. They manifested interest in your children to some extent, kindly interest of visitors? A. I would say yes.

Q. Would Sam Bayer—did you notice any attention he paid to the children particularly? A. He was very fond of both my children.

Q. Since these gifts have become a subject matter of inquiry, did you give any gifts to the Bayers of any type? A. No, I never gave Mr. Bayer any gift.

Q. Or your wife? A. No, no more than just having them for dinner, something like that.

Q. You tried to hold your own the best you could in 878
the Army on that score, is that right? A. That is right. I couldn't afford it.

Cross-examination by Mr. Robb.

Q. Captain Kogan, you said that you knew by sight Mr. Radovich, Major Radovich, is that right? A. That is right, sir.

Q. Do you recall whether you had ever seen him before this case started? A. I saw Major Radovich and met him for the first time two months ago.

Q. Two months ago? A. That is right, sir.

Q. Up to that time you had never seen him in your life, is that right? A. Never spoke to him, never knew of him.

Q. Captain, you also testified there was some casual 879
mention made of the Major by Mr. Samuel Bayer. I suppose Mr. Sam Bayer mentioned both him and other officers, didn't he, in a friendly way? A. He did.

Q. He would ask somebody at Mitchel Field if he knew somebody else at Mitchel Field, isn't that about the way it was? A. I would say along those lines.

Q. Sort of one of these games of playing, "Do you know So-and-So?" isn't that about it? A. That is about it, sir.

Q. In other words, if you find some fellow that is stationed somewhere and he knows somebody else who is there, you say, "Do you know Joe Doakes?" Isn't that about the way it was? A. Well, Mr. Bayer referred to Major Radovich as the boys' squadron commander.

Mr. Robb: Yes. That is all. Thank you.
Mr. McGohey: No questions.
The Court: Stand aside. Call the next witness.

GERALD J. FLYNN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Mr. Flynn, by whom are you employed? A. The Federal Bureau of Investigation.

Q. What is your title? A. Special agent.

Q. How long have you been so employed? A. Since November 10th, 1941.

Q. Now, in the course of your duties as an agent were you assigned as an investigator in the case now on trial? A. Yes, sir.

Q. And I call your attention particularly to the month of February, 1945. Were you present at the office of Mr. Wallace on the fourth floor of this building when the defendant Samuel Bayer gave some statement to Mr. Wallace? A. Yes, sir.

Q. And can you tell us who else was present in the room at that time? A. Special Agent Jacob Brown, also Special Agent of the Federal Bureau of Investigation, Mr. Keenan.

Q. Is that Mr. Keenan who sits at the counsel table here? A. At the counsel table. And I believe Mr. Levy was also present at that time.

Q. Of course Samuel Bayer was present? A. Yes, sir.

Q. And Mr. Wallace? A. Yes, sir.

Q. And do you recall whether during any part of that session I was present? A. Yes, sir. Just about—shortly after the interview of Samuel Bayer began you entered the room.

Q. Was there a stenographer present? A. Yes, sir.

Q. And there were notes taken? A. Yes, sir.

Q. Now, will you tell us in substance what Samuel Bayer stated to Mr. Wallace at that time?

Mr. Keenan: Your Honor, I object, and I would like to be heard on some legal propositions involved in this matter. 884

The Court: The jury will retire.

(Jury retired from the courtroom.)

The Court: I should like first to hear, Mr. McGohey, the Government's theory.

Mr. McGohey: Sir?

The Court: I should like first to hear the Government's theory as to the admissibility of this evidence.

Mr. McGohey: If your Honor please, I think that—

The Court: First let me ask you, do you contend that they were statements made during the conspiracy——

Mr. McGohey: No, your Honor.

Mr. Keenan: Wait a minute. Then, if that is true, I would like to have the United States Attorney state 885 what the theory is at this time of when the conspiracy ended.

The Court: I am not going to inquire into that.

Mr. Keenan: You are not going to?

The Court: No, sir.

Mr. Keenan: In any event, he states——

The Court: That is for the jury. But I am asking him now his theory as to the admissibility of this testimony.

Mr. Keenan: I beg your pardon.

Mr. McGohey: I think these statements are admissible as admissions by the defendant Samuel Bayer, and I might as well state here to your Honor frankly now that I intend to offer also statements, evidence of statements made by the defendant Elias Bayer and also the defendant Radovich.

The Court: When?

Mr. McGohey: When made?

The Court: Yes.

Mr. McGohey: The statement of Elias Bayer was made under the same circumstances as that of Samuel
887 Bayer, namely, downstairs in the office, in the presence of those whom the agent has testified were present when Sam Bayer made them, and that was in February, 1945.

The Court: What about the defendant Radovich?

Mr. McGohey: In the presence of their own counsel. Now, the defendant Radovich made a statement to Agent Flynn and Agent Brown first, some time in——

The Court: When was it?

The Witness: September, 1944.

Mr. McGohey: September, 1944. And then later there was a second statement——

The Witness: That was made about March 15th and 17th.

888 Mr. McGohey: The statement of September was made by Radovich down at Mitchel Field; the statement that was made later and signed by him—both statements were signed by him—was made in March, 1945, in this building, up in the office of the Federal Bureau of Investigation.

Now I claim that those statements are admissions by each defendant. I do not claim that the admissions of Sam Bayer are admissions against Radovich, and I assume that the Court would so instruct the jury,

by the same token, that the admissions of Radovich would be admissible only against himself and not against Bayer, under a proper instruction.

The Court: All right, sir. Now I will hear you, Mr. Keenan.

Mr. Keenan: Yes. I want to address myself first--

The Court: Let me ask——

Mr. Keenan: I am sorry.

The Court: You asked this witness to state the substance.

Mr. McGohey: Yes, sir.

The Court: If there are notes, if it was taken down verbatim, shouldn't it be introduced that way, if it is introduced at all?

Mr. McGohey: I will be very glad to. I have them here. I will be very glad to.

The Court: I am not suggesting that as any personal preference, but I mean as a matter of law. If statements were taken down in writing, would that not be the way to introduce them? I am not so sure about that.

Mr. McGohey: Well, I don't think, your Honor, that there is any valid objection to the agent testifying, or anybody else who was present.

The Court: I am inclined to agree with you there.

Mr. McGohey: He is testifying from his recollection of what he heard.

Mr. Ansell: I am sure the District Attorney will repeat his last statement. I didn't——

Mr. McGohey: What I said was, General, that I didn't think there was any valid ground for objection to the agent testifying as contrasted with the idea of putting in the written statement, because the agent certainly is qualified to testify to what he heard; he was present during the interview.

892 *Proceedings.*

Mr. Ansell: If your Honor please, I also feel like asking Mr. McGohey this: I am sure that in his statement he referred to these statements which he is about to include now as admissions.

May I ask you, sir, as to whether you are distinguishing between admissions and confessions in your use of that term?

Mr. McGohey: I am offering these as admissions.

The Court: All right, sir, I will hear you, Mr. Keenan.

Mr. Keenan: I am going to first address myself to the proposition of the discretion of the Court in the conduct of a trial from the standpoint of applying the 893 rules of practicability and not letting prejudicial matter enter into a cause involving the violation of serious criminal statutes. For example, it is going to be the theory of the United States Attorney, as he disclosed in his argument, that he intends to use the testimony of Samuel Bayer in proof of this conspiracy—because, after all, that is the charge before the Court, before the jury; it is not a substantive offense, and it is not an offense of an individual, it is a conspiracy—and he is going to attempt to ask this Court to permit a statement made by Samuel Bayer of a good deal of length, going into great detail, to be introduced in the trial of a cause where Samuel Bayer—where Elias Bayer, whom I represent, is on trial, and of course 894 Radovich, for whom I have no right to speak at all, and I do not expect to, but I assume that something will be heard from that side of the table as a practical matter, in behalf of Elias Bayer, to permit a statement going into considerable detail, as I know this will, because it would seem to me to be hideous to attempt to take a part of an alleged confession or admission and isolate it from its context, and take one part and leave out another, and then add a third, and

leave out a fourth, and so on; from the standpoint of common, ordinary decency and fairness that still prevails in our courts in this country, and ask solemnly your Honor to admonish the jury and say, "Now, that part of the testimony that has to do with the admission of Elias Bayer, of Samuel Bayer, the jury will accept that only as proof, if it believe it, or such part as it believes, of the guilt of Samuel Bayer, but none of it or nothing that is said in that recitation can in any manner or fashion be considered by this jury in determining the guilt of Elias Bayer."

Now, when he talks about the admissions of Elias Bayer, which is coming—your Honor wants us, I know, to discuss this in a practical fashion—then there will be a long statement, and I still say it would be hideous and grossly unfair on these most important matters, when even the language of a single phrase or a word might make all the difference between liberty and loss of it, and destruction of a man's reputation and all that goes with it, to say that a man's memory is to be taken on something that happened six or seven months ago, and he gets up on the witness stand, without a note, when we have a stenographic record of every single word that was said; but on that man's verbal recollection of what he recollects this jury of twelve people are asked to retain in their minds just that part that this witness spoke of as binding upon this particular defendant, and then he proceeds from that to the discussion of what was said by another defendant. And I don't know whether they intend to ultimately offer statements that were made before the court-martial out at Mitchel Field or not; they fall, some of it, within the same category. That I don't know. But I assume that if there is any logic, those would be admissible too, under the same theory. And

then the jury would be instructed that they will just take what Sam Bayer said out at Mitchel Field as reported by this gentleman (indicating witness), or by the stenographic record, which they also have available, and they will consider just what he said, talking about Captain Kogan or talking about Lieutenant Roeser, or talking about exactly what was said in the handling of these uniforms and so forth, a long statement that we know goes on. But none of that must be considered by the jury in any manner or fashion against Elias Bayer, who, as I stated, and perhaps I should make an apology for it, I don't know why he is even in this courtroom as far as any evi- 899 dence is thus far concerned against him. But the jury must consider nothing against Elias Bayer in what is said by this witness, so repeated, about Samuel Bayer.

Now, then Elias Bayer's statement will be given, presumably, and then the jury will be instructed that nothing that this witness says as coming from the lips of Elias Bayer in any manner or fashion may be taken into consideration by any members of the jury in their deliberations in determining the guilt of Samuel Bayer. And then, lo and behold, we will have a confession—I don't care whether it is called an admission or confession, your Honor; we are not engaged in a game of shuttlecock in this courtroom; we are engaged 900 in a very serious business, of course—I beg pardon for even adverting to it, of course everyone knows it—but when it comes to these niceties of expression, whether he made it as an admission or whether it is a confession, it sounds very reminiscent of Alice in Wonderland and Tweedledum and Tweedledee. But whatever——

Mr. Robb: Mr. Keenan, if the Court please, yesterday your Honor allowed Mr. Brown to come into the

court for a particular purpose, namely, to help Mr. McGohey with certain accounting records. Now I see Mr. Brown has come back in the courtroom during the testimony of Mr. Flynn. I don't think he ought to be here.

The Court: Is he going to testify?

Mr. McGohey: He probably will testify. I didn't know that he had come in. I assume that he came in because he thought that with the jury not being here this was legal argument and that he——

The Court: He might step out.

Mr. McGohey: Yes.

The Court: All right, sir, proceed. 902

Mr. Keenan: Now, well, I believe——

The Court: What have you to say to this proposition? You addressed yourself very ably to the possible detriment or prejudice which might ensue to the other defendants by the admission of the statement of Sam Bayer, but, on the other hand, if the Government has in its possession evidence of great weight as to the guilt or innocence of the defendant Samuel Bayer, is it not unfair to the Government to exclude that which is highly material, which may be highly material as to Samuel Bayer, because it might help someone else?

Mr. Keenan: I am glad you asked that question, because I think that is a very fair one and ought to be answered. That is the reason why we have Judges 903
in the courtrooms and why we have the right to severances in trials, no other reason, your Honor. Because I never knew of a better illustration that could be used by a professor in a law school in discussing the matter of criminal law and severances than the precise instance we have here.

If there is evidence admissible against Samuel Bayer, and I don't think it is—I want to come to that

in a moment, my reason for it; I am just approaching one phase——

The Court: While you are discussing it, tell me how I can sever a conspiracy.

Mr. Keenan: Your Honor, if you can't, and it is going to be prejudicial to this jury, to any one of the three of them, the defendants, then I come back to that good old Anglo-Saxon doctrine: better that a hundred men go free than one innocent man be convicted. And I say to your Honor with all the respect that I am able to command that it becomes an utter absurdity to tell this jury: You can recall what one
905 man says as only against him, but it must not be considered or influence you against the others. Your Honor, that is just hypocrisy, that is just plain ordinary insolence to the intelligence, no matter where it comes from or how. We all know that if there is a rule of evidence that is prejudicial and therefore inadmissible to permit—for a jury to consider statements made by co-defendants at a certain time against others, then I say to your Honor the preservation of that bulwark of liberty and freedom is of more importance than punishing one particular offense of this nature: that we are getting into, your Honor, the philosophy of the law—and I defer to the Court on that and I beg to be forgiven for expressing my views, and I have had some experience, too, in these days of
906 even making some of the Federal laws—and I don't say it in a boastful way, but studied the philosophy of it for a good many years, and I say to your Honor that I feel so strongly in this case it is more important, particularly in this day when civilization—and I don't try to be dramatic with this, but it is true—it is shocking today, but the United States of America is the only country where we can find the safeguards of liberty which are so important. We give up a

little in this country for our freedom, but it is worth having when we get through.

I know, if I can be permitted to state, I wanted to write a letter to tell the Director of the Federal Bureau of Investigation how proud I was of ever having anything to do with this lady, Mrs. Tracy, who spoke up voluntarily and said, "I would rather not sit on this jury, I have a son in the F. B. I." That doesn't happen in foreign countries, your Honor; that only happens in the United States of America.

But here we have the same fundamental points that are more important to protect the foundations of our liberty than to obtain the conviction of two or three 908
individuals in this case. I say if that balance comes, that there has to be a decision made.

Of course we must go to the realities, as your Honor pointed out to me. You said to me as counsel before this court if the Government does have important evidence against Samuel Bayer, why shouldn't the Government have the right to present that to the jury? The answer is plain. Because if you do there is no way under the sun of preventing the jury from taking that into consideration in finding other individuals guilty under the law. And the law says that that should not be done. In other words, the law says that if you let that statement in against Samuel Bayer, it is not admissible against the other two defendants. 909
I am interested only in one.

The Court: Let me ask you another question.

Mr. Keenan: That is not all I wanted to say. That is just one point.

The Court: I want to ask you this while I think of it, though I do not desire to have you argue it either way, because it is not material. I just wanted to ask you, will you concede or not—I guess it is all right.

Mr. Keenan: My answer, your Honor, would be in the negative; when I am representing defendants I won't concede anything.

The Court: That is just the thought that occurred to me and prevented me from asking the question.

Mr. Keenan: Before we get to that, I haven't said all I want to on that subject matter, but I think, with great respect for this Court and for the learned United States Attorney, that certainly there is a great deal to think about in what I have said. I am not just talking idly. If it comes to a point where we might attempt to become facetious, and we cannot do
911 that—but how could a jury isolate and separate these things? I couldn't do it without the attendance of my secretary down here. And a jury that makes no notes at all, to go through days of trial where these various admissions or confessions are coming in, and to say: You may consider that goes to X but not Y, it almost gets into a problem in algebra. But let us pass it for a moment.

We come now to the subject matter of the corpus delecti of a conspiracy. I don't know too much about the corpus delecti subject. I assume that it means the offense itself, the essence of the offense. You have got to show that there was a conspiracy. As I understand it, there must be a showing that there is a conspiracy before this would be admissible, before
912 these statements would be admissible against anyone.

The Court: It is my recollection, certainly, that a conspiracy cannot be proven by an admission of one party after the termination of the conspiracy.

Mr. Keenan: Your Honor stated it precisely.

Mr. Ansell: If Mr. Keenan would pardon me for a moment, your Honor, and I don't want to trespass upon what the United States Attorney may reply, or Mr. Keenan——

Mr. Keenan: I would be very glad to yield.

Mr. Ansell: Oh, no, no. Just a moment. I do not think I actually understood the statement made by the District Attorney when he was proposing these admissions of his. Would it be inappropriate or improper for me now to ask the United States Attorney whether or not he is proceeding in this way on the theory that he has actually proved the conspiracy, corpus delecti? I wanted to know if that was the District Attorney's theory at this time.

Mr. Keenan: Might I state that I understand, if your Honor please, and General Ansell, if the proposition of law is correct, as I believe it is, as stated 914
by his Honor, that a conspiracy cannot be proven by any statement made by one of the alleged conspirators.

The Court: By way of admission after the termination of the conspiracy.

Mr. Keenan: After the termination of the conspiracy. Now, on that I would like to address myself. I think if that is true, your Honor, and I believe that is a sound statement of law——

Mr. Ansell: I hate to butt in, if I could use the language of the street. I really wanted to know, and I don't want to be informed of it if it is not appropriate, your Honor, I wanted to know what the theory is at this instant of the United States Attorney, in order that we may address ourselves probably more 915
intelligently to that, as to whether he has actually proved the conspiracy at this point.

Mr. Keenan: And if so, what it is.

The Court: I don't want an argument at great length. I think that will come up more appropriately later about the conspiracy and what the essence of it is.

Mr. Keenan: Might I make a suggestion at this time?

The Court: Yes.

Mr. Keenan: How can we intelligently argue this point as to whether or not this is admissible if it—let us assume for the purpose of argument—it would be inadmissible if it came after the date of the conspiracy, these admissions?

The Court: The United States Attorney has stated that he does not consider these statements as statements made in furtherance of the conspiracy. Therefore they are inadmissible as evidence of the conspiracy or evidence to be considered as evidence against the other conspirators.

917 Mr. Keenan: Then I am asking, does he concede the statements were made after the termination of the conspiracy?

The Court: I am not going to require him to answer that. I think the question of when the conspiracy terminated is for the jury. Whether or not a conspiracy, that is, a prima facie conspiracy, has now been proven, is very material to me.

Mr. Keenan: Your Honor, how can we find out if a conspiracy has terminated unless we find out what the claim really is at the time of trial? We are halfway through the prosecution's case, or a quarter of the way through, I take it, and I don't know yet what the charge is as to conspiracy. It is alleged in the indictment, I am aware, that it is a violation——

918 The Court: It continued until July 2nd, 1945.

Mr. Keenan: All right. Then I say to your Honor that there is no evidence in this case to support that allegation in the indictment whatsoever. They may have some evidence, and if they have, I say we ought to postpone the consideration of the admissibility of those admissions or confessions until they have at least completed that part of their case. Because, your

Honor, there is no difficulty in their doing it, and they are purposely refraining from doing it.

The Court: Here is the situation as I see it. The Government tenders these statements as statements admissible against the party making them, inadmissible as to the others. The question of whether or not the evidence has proven in a prima facie way a conspiracy is material for me to know. I think I have got to determine it.

Mr. Keenan: Before we come to that point——

The Court: I have some ideas about it. The question I was about to address to you was, would you concede that there is evidence, prima facie evidence, 920
of conspiracy, and I realize that I should not ask that.

Mr. Keenan: My answer to that would be more than a pro forma denial. But before we get into that, your Honor, if I understood your Honor's statement, it is that a statement of a conspirator or alleged conspirator made after the termination of a conspiracy is not admissible to prove the conspiracy.

The Court: Is not sufficient to prove a conspiracy.

Mr. Keenan: Oh.

The Court: Certainly that.

Mr. Keenan: Not sufficient to prove it——

The Court: In other words, proof of the conspiracy could not be based and founded on it.

Mr. McGohey: On that alone.

The Court: What you quoted me may be the law; 921
I am not saying it is.

Mr. Keenan: I misunderstood your Honor.

The Court: Maybe I put it that way.

Mr. Keenan: I did not hear the words too well. But I would think that your Honor's latter remark would be towards the competency rather than the admissibility. You say it is not sufficient to prove it.

I don't think it is competent to prove it at all if it is made after the——

The Court: I am inclined to go that far, but I am not making any special——

Mr. Keenan: But then, your Honor, if that is true, I don't see why in this courtroom the United States Attorney would not be willing and anxious to say, "Yes, here is what we contend, the conspiracy started at this date and ended at this date," because if there is a continuation the United States Attorney is still standing on the proposition in his indictment, that there was a conspiracy that continued right up to
923 the 12th day of July, 1945, long after Radovich was in custody, some seven or eight months after he was in custody, and long after the investigation had started, and after the releases had been given in Time Magazine from the publicity department of the United States Attorney's Office of the Southern District of New York, that after——

The Court: I don't think it follows necessarily that the arrest of the defendant terminates a conspiracy. It is certainly a deterring factor, but I don't think it follows.

Mr. Keenan: Well, your Honor, living in a real world, and still getting away from Alice in Wonderland, we would have to have a good reason to believe that the parties ended the conspiracy when it had been
924 bruited around in Time Magazine, which is published all over the world. The so-called confessions were quoted, and they say, after the confessions——

The Court: That is a very deterrent factor, but I think it is for the jury to say——

Mr. Keenan: That is the only——

Mr. Robb: Your Honor——

The Court: We are getting off into some very interesting questions but we are getting off the track. Go ahead with your argument and I will hear you, sir.

Mr. Keenan: It is claimed in this case in accordance with the language of the indictment that these—no, I want to ask the question whether or not the Government claims that these statements that were made by Samuel Bayer, now offered, were made in the furtherance of the conspiracy?

The Court: He already said he did not.

Mr. Keenan: Made in the furtherance of the conspiracy.

The Court: He already stated that he did not so contend.

Mr. Keenan: The United States Attorney has answered that he is not offering this as a part of proof 926
that these statements were made in the furtherance of the conspiracy, and therefore we address ourselves to the question of whether or not the confession or the admission of one of the co-conspirators, alleged made in the absence of others, is admissible at all. I would like, your Honor—I am caught a little bit by surprise because I hadn't thought this would come up until next week, from the conference we had before, and I was in the process of getting some authorities together in the minimum time I have, with digesting evidence and the like, and I haven't the citations in the form that I would like to hand them to your Honor.

The Court: I don't think the citations would do me much good. You put your finger on my problem 927
and that is whether in the discretion of the Court the admission should be admitted as against one man, as against possible prejudice to the other. That calls for an exercise of discretion.

Mr. Keenan: I think I have said all I care to on that point. I say it is perfectly apparent, I say it with the greatest respect—we had a good deal about the practicability of the judicial process which is on

trial in every trial that ever takes place in any court-room, that to ask any member of this jury or all of them to accept evidence that your Honor would release what would be of a horrible prejudicial nature if it were taken into consideration at all, if it were admissible against other defendants. I don't see that your Honor has any real vital problem in deciding that one fact, to wit, is it practical to submit this statement to the jury and ask the jury to consider it only against Samuel Bayer and not against Elias Bayer, or Radovich, as the case may be? And the converse, is it possible, dealing in realities and actualities—and I am
929 happy to say that there is at least much of a concert of understanding among everybody, all professional men engaged in this trial, that we have all had actual experience in life to deal with realities and to face them as they are; we are here to give people a trial and we are here to obey and enforce these laws no matter how difficult they are to be enforced; but, your Honor, among the laws that we enforce are those laws of evidence and laws that are protective of our whole judicial process of giving a fair trial in a court-room

Now, it may not be fair, your Honor, to the Government to keep out admissions of this nature—perhaps they should be admissible against all the defendants on some theory or other—but the cold fact is that it
930 is definitely and well settled anywhere, there is no controversy on this point, that an admission of a co-conspirator after the conspiracy is ended isn't offered as part of the conspiracy itself, and isn't admissible against the other co-defendants. That is as clear as the driven snow.

Then I say to your Honor, it is just as clear that it becomes nothing more than a farce as a practical matter to say to a jury in a case of this nature: you

may consider this statement as binding upon Samuel Bayer but not his brother, when the law makes no distinction between them being strangers and brothers, or strangers and blood, and then to ask the jury, if Major Radovich's statement comes before them, in which he makes damaging statements that he would get money—we will assume that for the moment—and have some reference to some conference and the accumulation of the proof from the releases that are given out by the Government; to think that a jury could hear Radovich's statement read to them, and say: "You consider that now as against Radovich but you must not consider it against Samuel Bayer or Elias 932
Bayer." Your Honor, that is a farce. Far better to be frank and say: "We are going to toss that rule of evidence out the window because it is not fair to the Government; I am not going to be hypercritical and charge this jury and tell them to do something that I couldn't do or the nine Justices of the Supreme Court couldn't do if the problem were put up to them and I think they would be candid enough to admit it."

So I say to your Honor I don't think we have to go any further. There are some very keen questions of law, if I can use the expression, that we get into afterwards, but on the question of the discretion of this Court to permit any of this evidence, and I fortunately for the purpose of arguing have a nominal defendant, Elias Bayer, I can put it up to this Court; but the 933
same thing applies to other co-defendants.

The Court: Why do you refer to Elias Bayer as a nominal defendant?

Mr. Keenan: Because I honestly believe him to be that. I don't think there is any evidence in this case to show that he was a participant in any kind of conspiracy to defraud anybody or anything at any time.

That is my honest judgment. But, I say, I do represent Elias Bayer, and certainly the evidence is very thin against him. That I don't think is a vital assumption for the time being, but whatever it is, I don't need to argue that to your Honor. I can say to your Honor that if there is overwhelming evidence against Elias Bayer, then let them rest upon that evidence and let them not introduce before this jury statements of other co-defendants that are of such nature that, under the circumstances, this Court or any court in the land I think would be bound in good conscience and in the exercise of mental functions to say: "I
935 realize it would be nothing short of farcical to ask these jurors to set aside in their considerations these statements against these other defendants."

I can't overemphasize that, your Honor, and I don't want to be offensive, but I feel very strongly about it and I perhaps am too emphatic in the feeling and expression of my own views. I don't mean to be offensive, but I think it is very clear and perhaps I had just better drop it, by saying that is too clear for further argument on my part, that that is not practical and that it would be no more than striking a severe body blow, a body blow to the administration of justice in the country to say: We will keep a straight face—say to that jury, you will consider this statement made by Samuel Bayer only against him; now, Major Radovich will say that he got $5,000 from so-and-so, and
936 you will not consider that statement excepting as against Major Radovich. Your Honor, it would take twelve secretaries and you would have to put these jurors through a course of legal training and through so many activities that to trained minds sometimes are not able to employ to the full fruition in performing that function. And these jurors come from various walks of life.

The Court: You will concede that judges when they try cases without jurors frequently have to exclude from their consideration inadmissible testimony and decide the case on what is admissible.

Mr. Keenan: Your Honor, I would rather give you my answer to that at some other time when we are not in a courtroom, about how officially they do it. All I know is that judges are supposed to be omniscient, but I have had something to do with making them at one time or another, and I know they are human beings, and I have great respect for them, particularly all those in this country, and I still think they are human beings and I don't think they have reached 938 any stage of performing mental miracles either.

I don't think a judge could do it, your Honor. All that is aside the question. I know a jury couldn't. I feel on very strong ground in saying that to ask any jury to do that would be asking the impossible, even not in the age of atom bombs.

I say plainly, and I say it with great respect, that if they have a case and can prove conspiracy—when we talk about prima facie proof, here we get then, on another subject matter—but I think that if the Court is to make a finding the Court must make a finding on the points suggested, the same as a jury has to make a finding, and that must be by evidence so clear and convincing that it leaves no doubt in his mind as to any essential element of the conspiracy. 939

Now, I am going to say that on any other type of crime than conspiracy—of course, if this was a substantive charge, and there were substantive charges here against these men and they were nolled, and I haven't seen anything that we have got that was consideration from the Government yet; they were nolled because the Government thought it was to their best interest to nolle them; if there was a substantive

charge of bribery, yes, I haven't any doubt that the statement of Sam Bayer would be admissible. And, your Honor, it is not doing any harm to this Government because we all know in this courtroom the real charge is that Samuel Bayer bribed Radovich with the assistance of Elias Bayer, and perhaps some other matters. Time and again we have to say, piously, this is not the offense of bribery being charged or conspiracy to bribe, but, your Honor, it is liable to leak out in spots here and there.

And, regardless of the technicalities of the law that require your Honor to make that ruling, I think under
941 the language of the indictment, nevertheless, when we are talking about something that is in your Honor's mind, when he is using discretion as a judge, when your Honor might say to me, "Well, Mr. Keenan, you don't expect me, representing the United States Government on this bench, if there is a heinous crime committed, that I am going to let it go unpunished," and I say that your Honor would have no other alternative than that—we might have a closer question than we have, and perhaps then we would have to weaken some of these fundamental bulwarks that I spoke of, of liberty, that I really believe in, no matter which side of the table I happen to be on. But I say no such dilemma faces us at all. If the Government wants to get Sam Bayer for bribery, why doesn't it
942 go out and get him? It has indicted him already and it has dismissed that indictment. Why? There is no harm being done. But I think your Honor should say, with great respect, and a court should say under this situation: "Well, I am here to exercise my discretion and I am not going to charge this jury to do something that I know a jury can't do." Because I feel it would be an abuse of discretion to ask any jury to see Major Radovich in this courtroom and

have him talked about and described, a recital of his heroic deeds that occurred, and then have a confession come from him about something that Sam Bayer gave him, and then say to the jury: You can consider that against Radovich, too, just as though he never walked into the courtroom, as though you never heard that statement at all. That is the way the mind of this jury must be under the theory of our law.

And it is very important whenever that is broken down then something of real importance happens, and I say to your Honor it is for such reason, with all of the firmness that I can use, and all the sincerity at my command, that I regard my function in this case today 944
as of equal importance with all the years I spent, accumulated, in the Department of Justice, because justice is on trial in every case we have, and if there was any other way of getting it, that would be different. And your Honor knows from his own long experience of law before he graced the bench the old saying: "Hard cases make bad law." But here hard cases make very bad abuses of discretion at times. I know your Honor will give this his most earnest consideration and put aside any feelings that mortals have and have to have—we are all human at all times —but here in this case I say as a proposition you cannot let in the testimony of a witness as a concession or an admission of Walter Radovich before this jury and tell the jury not to consider that in determining 945
the guilt or innocence of Samuel Bayer in the same trial without making a mockery and a farce of the judicial process.

Mr. Robb: We join in all that has been said by Mr. Keenan. We think that this case is a very good example of the evils of the practice which has been condemned several times by the Supreme Court and by the conferences of the Senior Circuit Judges of joining

together in a conspiracy catch-all indictment defendants who could have been indicted separately for some substantive offense.

In this particular case we think it would be no more possible to separate in the minds of the jury these statements than it would be to put a drop of ink in a glass of milk and keep it on one side or the other.

Now, of course, I am aware of the general rule that where you have two or more joint defendants, the mere fact that evidence against one may mention some other one, does not give the other man any right to object to it and keep it out just because it happens
947 to him. And so ordinarily where you have two or more joint defendants, if you have some statement by one it goes in against him. But, if the Court please, we submit that there must be some discretion of the Court. Here in this case we have a most glaring example of the irreparable prejudice which would come to these other defendants from the statement made by Samuel Bayer that could not be cured by an instruction. So much for that.

We also urge upon your Honor most earnestly this point. Before any statement or confession can come in, there must have been established by the Government at least some prima facie showing of the crime charged. They must lay the foundation. And we can't do it, of course, by means of the confession. That
948 would be pulling yourself up by the bootstraps.

Mr. Keenan: I would like to address myself for a moment to the question which your Honor has in mind.

The Court: I would be glad to hear from you because I came to the view that a conspiracy has been proved.

Mr. Robb: I would like to address myself to that.

The Court: I would like to hear that.

Mr. Robb: What have they shown? They have shown that these boys, Bayer and Usdan—I call them "these boys" for short—were stationed out at Mitchel Field and they were moved several times; they were moved into the organization at one time commanded by Major Radovich. The evidence has shown that they were moved in there by Colonel Jacobson, not by Major Radovich. Colonel Boebel testified to that, so we can lay that aside. It is shown that they were moved out of there up here to Windsor Locks, Connecticut. And they were moved down to North Carolina and then they were moved up to Wilmington. And Miss Goertz testified that she was asked to do that by 950
Major Radovich.

It has also been shown, if the Court please, that the Bayers knew Major Radovich, were friendly with him, that he was at their house on parties; in other words, that they have shown some association between Major Radovich and the Bayers. Now, they have also shown an association between the Bayers and the other officers. They have shown some gifts. They have shown they were friendly. But, if the Court please, where have they shown anything that was corrupt? The essence of this conspiracy is the corruption, and where is there any evidence in the evidence to date of corruption?

The Court: How can you justify the transfer of these boys from the alerting unit to the Goldsboro 951
unit, and immediately transferred?

Mr. Robb: Miss Goertz testified that there were other people transferred out in the same way and transferred in there; and Colonel Boebel testified that he ordered Major Radovich in effect to move them out. And, furthermore, the evidence is, if the Court please, that if the boys had wanted to go out, all they had to do was to say so. There wasn't any bribe necessary; there wasn't any corruption necessary.

The Court: I will not debate the thing with you. I will listen to you.

Mr. Robb: So we submit, if the Court please, that certainly taking it at its utmost and its best, it would take a very strong and I think vivid imagination to conjure out of the evidence so far produced anything which could be said to be any substantial evidence of corruption, anything that could be said to establish any conspiracy.

Supposing at this point, if the Court please, the Government rested without putting in anything more? Certainly I don't think you would have to think more
953 as to whether or not they made out a case; they have shown association, yes, but they have also shown association between the Bayers and many other officers; they have shown other transfers with which our client did not have a thing in the world to do with, if the Court please. And I understand it is not even contended that those transfers were corrupt.

The Court: That is not to be held against these boys, of course.

Mr. Robb: No. Miss Goertz testified that the boys were transferred as more or less of a routine matter; other boys were transferred in the same way. And where, if the Court please, has there been any evidence of corruption, certainly on the part of this defendant Radovich, or on the part of the defendant Elias Bayer?
954 He, if the Court please, has hardly been mentioned.

Like Mr. Keenan I haven't had the opportunity to check on the cases in this matter. One case, however, which I think might perhaps throw some light on the matter for your Honor is the case of Forte v. United States in 94 Fed. (2d) 276, 137 A. L. R. 1120, which discusses in some detail the quantum proof required to support a confession. I do not know that it goes

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to the particular point we are now considering, namely, the quantum of proof which must be introduced before you hear any confession.

We submit, if the Court please, most earnestly that the foundation heretofore laid by the Government for the admission of this statement is certainly insubstantial, vague and nebulous and should not be enough to support the statement. On those two grounds, if the Court please, we object to this particular statement.

The Court: Have you any other evidence you could proceed with at this time?

Mr. McGohey: Not at this time, your Honor. I am prepared to go on now with these——

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The Court: Pardon?

Mr. McGohey: My preparation called for putting the admissions in at this time.

Now, I should like to say only one word, your Honor, with respect to this matter of discretion. It has been testified to here by the witness that these statements were made—talking now about the statements by the Bayers—these statements were made by Samuel Bayer and by Elias Bayer in the company of their counsel; they were made on the same day, one right after the other.

The Court: But not one in the presence of the other?

Mr. McGohey: No.

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Mr. Keenan: And isolated at the demand—at the direction of the United States Attorney they were not permitted to be there at the same time.

The Court: It doesn't make any difference who demanded it.

Mr. McGohey: I wonder if I could have the time to make my argument without interruption.

Mr. Keenan: I am very sorry. I profusely apologize.

Mr. McGohey: They were made on the same day, with Mr. Keenan and Mr. Levy there throughout each of the examinations, and as the written record will show no attempt whatever to prevent Mr. Keenan or Mr. Levy from making any statement on the record at all, and the written record shows that.

They were brought in at the request of the defendant, presumably, at least the request came to me from his attorney.

Now, this business of putting in the admissions of one man and instructing the jury that the admissions are to be considered by the jury only against the man
959 who made them, there is nothing new in that, your Honor. This is not the first conspiracy case that has ever been tried and certainly it is not the first case where it has ever been done.

The Court: I know. I have done it a hundred times.

Mr. McGohey: It is not a long case. It is not a case with fifty or sixty defendants. Why, your Honor, I argued an appeal here last year of a case that took seven and a half months to try in this courtroom; there were seventy-five defendants named in the indictment, thirteen of them went to trial, eleven of them were convicted and five appealed, and one of the strongest arguments made in that case—that is the case of United States v. Ames, right in this circuit—was that all of these admissions and all of these admissions
960 by the various co-conspirators—it was an enormous mail fraud case; I had nothing to do with the trial of it—prejudiced everybody. And our Circuit Court went into that very particularly. And the whole basis of the affirmance goes to the question to what extent any of the individual defendants on trial, or the appellants, were prejudiced by them, and the Circuit Court held this, in substance: That when men go into a conspiracy they run the risk of that very thing.

One of the things claimed about in that case was that seventy-five people were dragged in in a great big dragnet, and I argued, and the Court sustained us, that when you go into a conspiracy that is the chance you take.

We didn't take these men in or dragoon them into making any statement. They were walked in here by their counsel. And I don't think it is beyond the ability of your Honor, and I know it isn't—and I have looked over that jury and I think they are reasonably intelligent people, and I think that is all they have to be to have it explained to them: That what Sam Bayer says he did does not prove that Radovich did something and does not prove that Elias did it, and, by the same token, if Radovich says he took money from Bayer that does not prove that Bayer gave it to him. 962

But the jury will have before them—and what is more reasonable, your Honor, than the jury have the very highest of testimony, the testimony of the defendants themselves, each saying what he did in that case? This statement is complete by the Bayers. They make some denials, they admit they did this and they say they didn't do that. They were given the fullest opportunity to each state his position. And they were represented by the same counsel.

Now, Mr. Keenan said we ought to be realistic. I think we should, your Honor. And, in connection with being realistic, I suggest this: Is it realistic to assume that before the two persons represented by the same attorney come down to talk to a prosecutor about their actions, that they haven't had conferences? Why, of course, they had. Mr. Keenan or any other lawyer worth his certificate would certainly never bring clients in without having canvassed the whole story with them. That was his duty to them. And I am sure 963

that Mr. Keenan performed that duty fully and completely and well.

Now, there is something realistic to consider. These men were not being taken in a vacuum, one man in New Jersey and the other man in the State of Washington. They were right here.

Now, as far as the defendant Radovich is concerned the testimony will show here, I am prepared to prove, that this man gave his statement willingly when he gave it the first time, and that between the first time he gave his statement and the second time that he gave his statement—as a matter of fact, within a day
965 or two after he made the first statement—he called the agent on the telephone——

Mr. Robb: I hate to interrupt, but I thought that this concerned only the statement of Sam Bayer.

Mr. McGohey: You have argued the question of Radovich.

Mr. Robb: No.

Mr. Ansell: We have not.

Mr. Robb: Oh, no, I haven't even got to that.

Mr. McGohey: Well, in connection with that, your Honor, we will be prepared to take that up later, if that is so. I will confine myself to the Bayers, your Honor. The statement is here. The stenographer that took the statement——

The Court: The same question arises as to all three.

966 Mr. Robb: Yes. I have some little different questions as to our client Radovich when we come to it.

The Court: I would like to hear you fully on all of them and not piecemeal.

Suppose you suspend——

Mr. McGohey: Yes, I would be glad to.

The Court: —and let me hear you.

Mr. Robb: Frankly I am not prepared to argue that yet because we haven't got the evidence as to the

circumstances on which the statement was made. I had assumed when we got to that point we would practically have a hearing on that particular statement.

Mr. McGohey: Well, could we——

Mr. Ansell: Pardon me. Go ahead, Mr. Robb, I am sorry to interrupt you, Mr. McGohey.

Mr. McGohey: That is quite all right.

Mr. Ansell: I am sorry to interrupt both of you gentlemen and sorry to impose upon your Honor also. I do not like arguments ad hominem, but the truth of the matter is, your Honor, that this statement which we have never seen or heard of so far as I know—— 968

The Court: Which one are you referring to?

Mr. Ansell: The statement that Mr. McGohey is about to introduce now, the statement of one of the Bayers, Sam Bayer. Mr. McGohey, I thought rather skittishly, and I am not using the term in any criticism of him, called it an admission.

Now, there are admissions as such and there are confessions also, and their admission is governed by an entirely different rule. I said I did not like argument ad hominem and I don't, but we came down here this morning, your Honor, not anticipating this. We have a statement made here apparently taken down in shorthand, transcribed, and I think Mr. McGohey said it was signed, but, whether or not it is in writing we have never seen it, haven't the slightest idea what it is about; and the practical argument, if I could make it without offending anybody, is I think that we are entitled to see that. I think this hearing is precipitate. I wish it might be deferred. I wish that we all might be prepared on it. 969

Mr. Keenan: General Ansell, would you permit me to interrupt for a moment?

Would it be possible to ask the United States Attorney to proceed with some other part of his cause so that we could have—we know as a matter of fact we are going to adjourn——

The Court: I made the same inquiry. He said he has not anything else ready to proceed with.

Mr. McGohey: I respectfully submit that the question of how I am going to put my case in is a matter for my judgment. I don't believe defense counsel has any right to ask that.

Mr. Ansell: I did not intend to.

Mr. McGohey: I am not talking about you gentlemen.

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Mr. Keenan: I only intended it as a practical matter, so that we could get some authority.

The Court: Yes. I would like to give it some thought and examine the statement, and I am going to take time to do it.

Mr. McGohey: I submit that you certainly should on a question of this kind. I do not quarrel with that, your Honor, but I do not think I am fairly to be criticized because I was prepared to do something and a legal argument comes up.

The Court: Oh, no.

Mr. Ansell: You have been very fair.

Mr. Robb: If the Court please, might I say one thing more about your Honor's suggestion that we

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argue now the statements of the defendant Radovich. They were made at different times and different places and under I think quite different circumstances than those of this particular statement. Therefore we would like at the proper time to examine the agent on this statement and perhaps put on some testimony there.

The Court: I would think the same principles apply unless you contended that there was duress applied.

Mr. Robb: Of course, that might well develop.

The Court: That presents a different question. If the same principles which we discussed here this morning——

Mr. Robb: That is true, but there also are other considerations, so that at this time I regret that I am not prepared to argue that, because I am not ready.

The Court: You may go ahead. I will defer the determination of the Radovich statement and you go ahead, Mr. McGohey, and finish, if you haven't already finished, the statement which you now present.

Mr. McGohey: You mean my argument?

The Court: Yes.

Mr. McGohey: I think, your Honor, that with respect to the statement about the Bayers I don't have anything further to say. 974

The Court: Will you let me have the statement?

Mr. McGohey: Yes, indeed.

I might say this to your Honor. I understood Mr. Keenan's argument, one part of his argument, to be a criticism of putting these what we call admissions in by the oral testimony of the agent and said that parts might be put in and parts might be left out. The Government is perfectly willing to offer that full transcript of the statement of each, of Samuel Bayer or Elias Bayer.

The Court: I recall very definitely where the precise point went to our Supreme Court in Virginia within the last year about whether the commonwealth, it was then, being in possession of a written statement, could proceed by the oral testimony of the sheriff rather than putting in the written statement. And the Court held that it was entirely proper for the Government to proceed, the Commonwealth to proceed, as you now propose to proceed, that is, to put the testimony in by the testimony of a person who heard the admissions made without putting—— 975

Mr. McGohey: I am quite satisfied, your Honor, that that is perfectly sound.

The Court: And from the looks of it I think your course is the same practical one.

I will take a recess now while I examine the papers.

(Recess.)

(The jury returned into the courtroom.)

The Court: Ladies and gentlemen of the jury, a situation has developed which makes it impossible to proceed further today with the taking of evidence, so I am going to adjourn you now until next week. It has also been agreed by counsel for all parties and
977 the Court that when we adjourn today we will adjourn until Tuesday morning. We will not have a session in this trial on Monday. So we will now adjourn until Tuesday morning at 10.30.

And for your information I would like to say, further, that if we have not then concluded the case we will not sit on next Friday which is Columbus Day. We will adjourn for the holiday.

So, so far as we can see now, we will continue the trial of this case Tuesday, Wednesday and Thursday, and, of course, it is hoped by all parties that we may complete the case by then, but if we haven't we will then adjourn it over until Monday; we will not have a session on Friday. I say that to you now so that you may make your plans accordingly.

978 Now, let me repeat to you briefly the admonition I gave you when we started. This is somewhat of a considerable interval between now and Tuesday, and be very careful during that time not only not to discuss the case amongst yourselves, but more particularly do not discuss it with anyone else nor permit anyone to discuss it in the slightest detail with you.

All right. The Court will adjourn now until Tuesday morning.

(Adjourned to October 9, 1945, at 10:30 A. M.)

New York, October 9, 1945, 10:30 A. M.

TRIAL RESUMED.

(The following proceedings were had without the presence of the jury:)

The Court: Gentlemen, the question which the Court has before it is the action which should be taken upon the defendants' objection to the introduction of evidence of a statement or statements made by Samuel Bayer, one of the defendants. I heard you gentlemen fairly fully on Friday. If you have anything which was not presented on Friday, I will be glad to hear you.

980 Mr. Keenan: Your Honor, I would like to call the Court's attention to a few authorities that were not referred to, particularly the case of Forte v. United States, that was decided in the Circuit Court of Appeals for the District of Columbia and which made a rather exhaustive analysis of the entire matter of admissions and confessions and the philosophy behind the law—why they would constitute, if they do, exceptions to the hearsay rule.

In the Forte case it is clearly set forth that there is a necessity of establishing the corpus delicti independently of the confessions.

The Court: I am thoroughly in accord with that.

Mr. Keenan: And the quantum of proof required is set forth, too, as being substantial evidence which is of tremendous importance in analyzing the admissibility of these 981 confessions. Of course, that is what they are, if they are anything.

Now, in turn, the same distinguished jurist, Stevens, speaking for the Court on both occasions, in the Gypsum case, has set forth a definition of substantial evidence which, while that deals with civil litigation, nevertheless treats the tests to be applied to the quantums in criminal as well as civil; and, of course, it would require no argument to

convince the Court that the civil requirements would be at least—that the criminal requirement would be at least as substantial or more so than civil.

Now, therefore, your Honor, I am not going to burden this Court with many citations—they are set forth in these two cases—but they establish very clearly two things, first, as your Honor says: I think the law is well recognized, independent of the confession, that there must be independent proof, not, your Honor, of the commission of the offense as I understand it, to be candid with the Court, for it would be to our advantage to say that of the entire conspiracy, but only, it is my belief as a lawyer and an officer
983 of this Court, of the corpus delicti, that there must be proof of the corpus delicti. And I say to your Honor, from the careful analysis that we have made in this case, that there is no proof arising to the standard of the quantum required clearly by the law of substantial evidence of the corpus delicti in this case.

Now to come to that conclusion, your Honor, and may I say with great respect to the Court that I don't think under the law, I do not think under the law that it is the privilege even of the Court to lump both matters together and leave it to the jury in the manner and fashion that is sometimes permitted on other occasions, but I think it is an issue of fact to be determined by this Court.

The Court: I don't understand you. Lump what together?

984 Mr. Keenan: Lump it together by saying, "I don't know whether there is or there isn't, the jury will find whether there is substantial evidence." I think that this Court has the duty of making that finding.

Now we come to that, too, your Honor, I have the right to suggest at this time our entire theory of the defense against admission of this type of evidence as it is presented, and I assume when the Federal Bureau of Investigation agent is on the stand I have the right to assume that they

are going to attempt to prove it by parol evidence from him. I think, your Honor, if we are to be heard, we ought to be heard at this time on it.

I think in any event before we come to the question of admissibility, and I am talking now about admissibility of these confessions—I am interested in the Bayer one for the moment—that we have to come to the philosophy of what these confessions are and why they are supposed to be received, and it is very clear and it is this: that, what possible better evidence could there be on the proof of any fact concerning a crime than that coming from the lips of the man who was supposed to be the perpetrator of it? The theory being, if the man is in his right mind at the time he made the statement and knew what he was doing, it is the best evidence possible. And we are in a court of justice to determine not by fantastic rules but by real solid rules, what is and what is not good evidence, and that certainly is excellent evidence, as appears. Why? Of course we come dangerously close to the violation and the question of whether we are moving in on the encroachment of the amendments to the Constitution that provide a man shall not give testimony against himself, but leaving that aside——

The Court: Shall not be required to give.

Mr. Keenan: Shall not be required, yes, your Honor. But we come to something far deeper and that is that this is hearsay, and like every other piece of evidence that comes within the category of hearsay, it must be purified from the contamination of hearsay or they won't let it in. That is the whole philosophy of the admissibility of this evidence. First of all, you get the general rule; all hearsay is out. That is an unquestionable rule of evidence. But there are exceptions. We will not burden the Court to attempt to manifest our own erudition by naming them, if we could, but one of them is confession. In my preliminary argument I said I don't care whether it is called

admission against interest or confession. But why? Because when a man knows that he is giving a statement that is against his own interest and he is a sane man, why in the name of common sense would he ever tell it if it wasn't true, period. All right. Then it becomes of paramount importance to find out the background of what happened, or how he happened to make the statement.

I am going to tell your Honor, and there is no jury here now, as I recall what the facts were in the case. These men were under arrest. They came to me and they told me their story and I listened to it. I might state to your Honor that this is the first criminal trial that I have participated in since I left the Department of Justice in
989 1939, and I listened to it with great care because I sensed a very important matter at the first instance. And after hearing all their story I became convinced that if it was true, it came within the category of those offenses that I dedicated some few years of my life to try to prevent, to wit, extortion in the United States of America. And that is what I believed it to be under their testimony.

So I said to them, I am going to the United States Attorney, and if this is extortion and if the initiative for this money business came from Radovich, I don't believe a crime has been committed and I don't believe the United States Attorney will want to prosecute it; but when you were confronted by the representatives of the Intelligence group of the Army you denied it, denied everything, and
990 the United States Attorney never has had an opportunity to pass upon your side of the picture. Now I am going to bring you down, I am going to ask the United States Attorney if he will listen.

And I went down myself. I have no memorandum taken of it. And I talked to Mr. McGohey, I talked to Mr. Wallace, and I put it up to them. And they said, well, there was a divergence of views between Mr. McGohey and Mr. Wallace. Mr. Wallace said, I don't think it makes any dif-

ference where the initiative comes from in this case, I think it is a crime anyway. And Mr. McGohey said, if I recall, and I want to take no advantage of this situation, Mr. McGohey said, I would be inclined to agree with you, Mr. Keenan, that if this was not as we have understood it, but if—I told him the story in substance as I recalled it—if it is a matter of extortion and if the suggestion came from Radovich rather than these people corrupting him, and making suggestions they would give him this money if he would do thus and so, I would be inclined to believe that there should not be a prosecution, in substance.

Now I came back and told that to my clients. And under that understanding, because I haven't reached the age of abject idiocy to bring my clients in to have them tell a story which would put them in the penitentiary if true—and I want to draw a distinction between two things which are easily confused or might be: one is that the mere fact that I was going down to tell this story to Mr. McGohey or the United States Attorney meant immunity; certainly not, nothing of that kind. But there was a very distinct understanding, and the only reason I brought them down, and the only sane reason I could bring them to Mr. McGohey would be that if their story was true they had not committed an offense against the United States of America. That was my advice to them, that was my belief then, and for whatever it amounts to it is my belief today.

Now, under those circumstances, they came down and they made their statement. No coercion, none whatsoever, no promises other than an understanding that I had with Mr. McGohey—and I think that he would not say no to it—that if the story was borne out that they were the victims of extortion and chicanery rather than they initiated the bribery, there should not be a prosecution against them in this case.

Now, your Honor, I think I have known Mr. McGohey long enough, and I am telling everything as though I were

under oath, and would take an oath to it on the witness stand if the occasion called for it; that is my distinct understanding of what the facts were with reference to these men coming down and making these statements.

Under the circumstances, from the sheer standpoint of fairness, your Honor, to take a part of that statement and disjoin it from the continued story in the eyes of the jury and get some man who was not in the room, to my own knowledge, at the beginning and at the end, or at the beginning all the way through of this statement, and let him give, under those circumstances, what he recalls to be language precise, and might change the difference of an
995 expression, even, and then leave out the rest of it, I can't believe that anyone is serious in making that suggested proffer of evidence, a suggestion of fair people. I have always been able, your Honor, to take care of myself in a court room—I have that much conceit and I am not asking odds of anyone—but I do say that plain fairness would require, under those circumstances, that the entire story go in, if any of it went in, to prevent distortion. But beyond that I say that the law clearly requires that the background be examined before your Honor permit any testimony to come from a witness in the case when we are forewarned and forearmed of what the facts and circumstances were leading up to this.

Now, the authorities—and I confess, your Honor, when I was in the Department of Justice and had the honor to
996 head the criminal division, I never was very much interested in inducements. We never gave anybody anything by way of putting another man in jail by telling on him. We did not believe in that type of prosecution. During the time I was there, 1933 to 1936, as head of this division, we had none of that.

I have looked at the law since and it is very clear, following the Wilson case, that if a confession occurs by rea-

son of inducement then the law clearly says that it is inadmissible as an admission or a confession.

And the Supreme Court goes far enough to say there is no yardstick or no quantum of inducement, any inducement——

The Court: Do you contend that there was an inducement?

Mr. Keenan: I am stating what the facts are, your Honor. And I say the law draws the conclusion therefrom that there was that inducement. Yes, your Honor. As a matter of law applied to the facts I think we cannot escape that conclusion. And, of course, I will want to bring out these facts on a voir dire before any testimony with reference to a confession is permitted. 998

Now I would want to make it very clear if I were asked under oath whether or not the precise point between Mr. McGohey and myself and Mr. Wallace was ever brought up, as to whether or not this evidence would be used in case we were not able to convince Mr. McGohey of the truth of the statement, I would not be able to answer it; I perhaps should be. But I would state that I am not able to answer that question. They may be on the other side. I have no recollection of it. I might state that I was optimistic, that I believed that I was representing people, and I think the evidence in this case as we go farther will bear me out on that, with some more information I have here that is very comforting since, that we were the victims of the cupidity of someone else. To come back to the precise point I am stating to your Honor, that these are the facts that I believe will be brought out as I recall them. I had a colleague, Mr. Levy, with me—I have never discussed this feature with him that I am talking of this morning now, and I don't know what his recollection would be—I believe I know what it would be—but I say, applying the facts of the giving of this testimony to the law as it exists, it does draw it within the orbit of non-admissible testimony. That is my answer to your Honor's question. 999

It is one of those things that happens in life in dealing with costs that come along, and I am giving my own best recollection of it, but my mind is rather clear on it, what I am stating, and I am stating to your Honor that in any event, I think that that is a proper matter for inquiry before any of this testimony with reference to Bayer's admissions made or confessions so-called—and I am using that always with parenthesis around the word "confession" because I don't believe it is a confession; the whole purport of my argument is that when you take the background under which Mr. Bayer went down and gave his story, it does not constitute an admission against interest at all. The theory is that a man will not make a statement that is
1001 against his own interest unless it is true. In this case we didn't consider it [redacted] against interest, and not because of any consideration, because I make it clear that we were asking for no mercy or consideration whatsoever—let the chips fall where they may; that is very, very clear. And, your Honor, it is not like the situation, nor will the United States Attorney contend it for a moment on this, I am sure, he will never contend that I brought my people down to him and said, "Here, there has been a violation of the law, but when you hear that there has been a violation of the law under the circumstances you won't want to prosecute it." That was not my position and it won't be so contended.

My statement was that under the facts you have never had a chance to hear them, and when you hear the whole
1002 story—that is what I said to him, the whole story—you won't, in my opinion, find that a crime was committed, and I don't believe that, therefore, you will want to proceed with any indictment, because this was after arrest but before indictment.

Now I don't care to argue that any more. As an officer of this Court I just want to bring those facts to the Court's attention. I suggest that they ought to be developed on the

voir dire before the Court passes on the subject of the admission.

The Court: How can that be done?

Mr. Keenan: It can be done by a voir dire examination right now.

The Court: Of whom?

Mr. Keenan: Of any witnesses that the Government wished to put on, any witnesses we wish to put on.

The Court: As I understood it, you were relying here upon facts within the knowledge of the United States Attorney. The witness who has been called would not know what the circumstances——

Mr. Keenan: I certainly don't intend to have him come into a room, conveniently or otherwise, and I am sure that he would not, in ignorance of those facts, and I am sure it wasn't. I am sure he met Mr. McGohey—I know something about the F.B.I., and they don't stumble into a room: "What is this man, Keenan or Jones or Smith, doing here?" I don't intend to have him give this statement if I can to the jury and then cross-examine him afterwards, after they have heard the whole story about how it comes in. I would say the orderly procedure would be, let him go forward with Mr. Flynn on the witness stand and I will ask the right to interrupt him and cross-examine, to suggest a voir dire examination on this subject matter that I am raising. 1004

The Court: If your questions go only to the admissibility, why wouldn't it be proper to let you examine him along that line now in the absence of the jury. 1005

Mr. Keenan: I think that is the proper thing.

The Court: Call him. Come up. You have been sworn.

GERALD J. FLYNN resumed the stand.

Preliminary cross-examination by Mr. Keenan.

Q. Mr. Flynn, I think the record will show we have asked permission to ask you some questions in cross-examination at this time. How long have you been with the F.B.I., did you state? A. Since November 10, 1941.

Q. 1941? A. Right.

Q. What is your age? A. I am thirty-four.

Q. Thirty-four. What was your business before you came with the F.B.I., or your business or profession? A. I was a lawyer. I worked with an insurance company. I
1007 was a reporter. And that takes in about all of it.

Q. What law school did you attend? A. New York Law School.

Q. Did you graduate? A. Yes.

Q. Were you admitted to the bar? A. Yes, sir.

Q. When were you admitted to the bar? A. 1938.

Q. Have you done some practicing in New York City here? A. Some.

Mr. Robb: I can't hear Mr. Flynn back here.

The Witness: Some.

Q. Are you married, Mr. Flynn? A. Yes, sir.

Q. When were you married?

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The Court: I don't see how——

Mr. McGohey: I object, your Honor. I don't see the relevancy of this question.

Mr. Keenan: All right. I will find out otherwise, if I want to; anyway.

Q. Now, when did you start to work on the Bayer case? A. September of 1944.

Q. And did you work pretty continuously on it after that? A. Yes, sir, with some interruptions.

Q. You had an associate, Mr. Brown? A. Yes, sir.

Q. And he worked, too, on it? A. Yes, sir.

Q. Is Mr. Brown a lawyer? A. No, he is an accountant.

Q. He is an accountant. Now, you were present in the office, one of the offices of the United States Attorney when Samuel Bayer was there? A. Yes, sir.

Q. When was that? A. That was in the early part of February of this year, I think February 7th or thereabouts.

Q. Did you make some notes on it? A. No, I did not make any notes.

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Mr. Ansell: I didn't hear the answer.

The Witness: No, I did not make any.

Mr. McGohey: Will you please try to keep your voice up so that General Ansell and the defendant over on the right there can hear you?

Q. How did you happen to meet Mr. Bayer there? Can you tell us how you happened to go down there? A. I was told by Mr. Wallace that you were bringing both of the Bayers into his office in order to have them tell their part of the story.

Q. Do you know what time of day it was? A. Yes, sir.

Q. What time of day was it? A. It was approximately 10 o'clock.

Q. And were you in the office when Bayer came in, or 1011
did you come in after Bayer was in the office? A. I came into the office after Samuel Bayer was in the office; I was in the office before Elias Bayer came into the office.

Q. Mr. Samuel Bayer was talking and giving answers to Mr. Wallace's questions when you came in, wasn't he? A. I don't think he was talking at the time I came in. I believe that he had already begun, though.

Q. He had been interrogated? A. Yes, I believe I came in just after the inquiry started.

Q. Do you know when the inquiry started? A. I presume—I was told that it started just a few minutes before I came in.

Q. Who told you that? A. I believe Mr. Wallace said, "We just started" as I came into the room.

Q. Was there a stenographer taking the record? A. Yes, sir.

Q. You don't know the facts and circumstances yourself of how Mr. Bayer happened to come there, do you, of your own knowledge? A. No, sir.

Q. Except from what someone told you? A. That is right.

1013 Q. Were you present when Major Radovich's statement was taken? A. I took the statement from Major Radovich.

Q. Did he give a statement that was signed? A. Yes, sir.

Q. You have that statement? A. Yes, sir.

Q. Were you present at the court-martial when the witnesses were called there?

The Court: Aren't you getting away from the question on the Bayer statement now?

Mr. Keenan: I just want to ask him if he was there at that time, your Honor. I don't know, perhaps that was given afterwards. I will withdraw that question.

Mr. McGohey: I don't think any of this line of questioning about Major Radovich is relevant to what
1014 Mr. Keenan was trying to prove here.

Mr. Keenan: All right.

Q. So that of your own knowledge you don't know how Mr. Bayer happened to be there? A. I don't know what arrangements were made before Mr. Bayer came into the office of my own knowledge.

Q. Do you know or were you told by Mr. Wallace that some arrangements were made that I was to be there with him? A. Yes, sir.

Q. Did you talk to Mr. McGohey about it? A. No, I did not talk to Mr. McGohey.

Q. So that what the arrangements were or what understanding was reached, if any, you wouldn't know of your own knowledge? A. Of my own knowledge, no.

Mr. Keenan: I think, your Honor, this witness can't give us any light upon the pertinent subject matter.

The Court: The way I see to get into the record the matter which I understand you have in your mind is a statement from Mr. McGohey. As I understand, you are relying or making a contention as to the understanding you and Mr. McGohey had.

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Mr. Keenan: And your Honor's idea is that the only way that could be proved would be testimony from Mr. McGohey?

Mr. McGohey: I did not understand your Honor to say that.

The Court: I did not say so.

Mr. Keenan: I wondered. I thought you meant that.

The Court: I did not say so, no, sir.

Mr. Keenan: Do you think that it would have to be from Mr. McGohey and Mr. Wallace and Mr. Levy and myself?

The Court: Well, there is no evidence in the record.

Mr. Keenan: No, but, your Honor——.

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The Court: All I have is your statement. Now, if Mr. McGohey wants to state his side of that, I don't see any other way to get it except from him.

Mr. Keenan: I would like to have him, if he would.

The Court: Do you wish to make any statement?

Mr. McGohey: Yes, your Honor, I will.

The Court: All right, I will hear you.

Mr. McGohey: Will you excuse me just a second?

The Court: You don't wish to ask this witness any questions?

Mr. Keenan: No more at this time, unless there is something further comes up after the statement.

Mr. McGohey: Your Honor, as I understand, what has been suggested now is that I make a statement giving my contention with respect to the matters that Mr. Keenan has covered in his statement and his argument to the Court this morning.

The Court: It is a little narrower than that. There is a very unusual situation being presented to me. But, as I understand it, Mr. Keenan stated certain background leading up to the Samuel Bayer and Elias Bayer statements.

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Mr. McGohey: Yes, sir.

The Court: And makes the contention to the Court that it should be inferred from his statement of the background that these statements were not voluntary in that they were induced. Now will you confine yourself to that?

Mr. Keenan: Your Honor, I would like to correct that, that it is not a contention. We do not say that the statement was not voluntary; we say it was not only voluntary but anxiously given, but that there was an inducement to so give.

The Court: Isn't the statement which is given pursuant to an inducement not a voluntary statement?

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Mr. Keenan: Counsel at the trial table agree with your Honor. I don't happen to believe that. I don't want to raise the point any more than saying I think the law and the philosophy clearly use the expressions "coercion" and "inducement,"-but I want to be sure that there is nothing of the first part in it, that it was inducement, that it was given under the inducement theory.

The Court: There is a little difference there between legal terminology and ordinary understandable English.

Mr. Keenan: All right, whatever it may be——

The Court: Of course, from a layman's standpoint a statement which is given pursuant to an inducement is not only voluntary, it is more than voluntary, but it is not voluntary, not freely given, which the law requires as I think it is generally comprehended in the word "voluntary" as used in the law.

Mr. Keenan: With that understanding of the term, I will not have anything further to say about it.

Mr. Ansell: If your Honor please, and with permission of Government counsel and Mr. Keenan, as your Honor must perceive, we are on the outside of this inquiry, but nevertheless— 1022

The Court: You are on the outside in a sense, and in a sense you are not at all on the outside.

Mr. Ansell: Exactly, sir.

The Court: You are interested.

Mr. Ansell: We can be hooked, if you will pardon the term, by this admission of this so-called confession, or whatever it was. Now, my own view is, and without reflecting upon counsel—of course not—a record ought to be made of what is going on here; if there were inducements, if there was anything that militated against a freedom of mind upon the part of this man Bayer, I don't think we are making a record with respect to that by counsel's argument to the Court. I think that that issue ought to be tried out by your Honor, and I say it with all respect to the gentleman. Voir dire is mentioned. It seems to me that we ought to have testimony under oath here with respect to the question whether or not this man Bayer, when he made the statement, did have freedom of mind or not. That is the meaning of "voluntary." 1023

This talk that we are engaging in here, it seems to me, does not make the record of which I could avail myself probably hereafter. Will your Honor pardon me for trespassing thus far?

The Court: That is all right. All right. Have you anything to say in pursuance to that suggestion?

Mr. Keenan: It is a somewhat unsual situation, your Honor, but I do think that under the facts and the circumstances of this case I have no objection to facing the issue exactly as it is and taking an oath on the witness stand and giving my testimony, and subjecting myself to examination from the learned
1025 District Attorney and assistants, and General Ansell and the Court. I am making a statement, and I am an officer of the court, but I am willing to put myself under oath and subject myself to any examination or any questions. Of course, your Honor would ask any questions anyway.

The Court: It is not for me to suggest how you conduct your case.

Mr. Keenan: No, that is right. I want to say that I am not through conducting my case yet. I thought it might be the wise thing to see what Mr. McGohey's understanding is. We might not have to take any testimony in the case. So I would rather we go along the way we were.

The Court: All right, sir.
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Mr. Keenan: And then see what happens.

The Court: Then let me hear from you, Mr. McGohey, along the line I suggested.

Mr. McGohey: Now, your Honor, these defendants Bayer were arrested some time in September, I think it was, 1944.

Mr. Keenan: You are wrong about that, Mr. McGohey. It was about November.

Mr. McGohey: November. I will accept the correction. In any event, your Honor, they were arrested on a complaint charging them with the crime of conspiracy——

The Court: Were they admitted to bail?

Mr. McGohey: Yes.

The Court: Promptly?

Mr. McGohey: Yes. Bail was made the day of arraignment. At that time they were represented by the man who is, as far as I know, still the attorney of record, Mr. Conrad Cohen. And then some time in December Mr. Keenan called me and stated that he was retained, as I understood it, as counsel in the case, 1028 and asked if he might come to see me.

He came to my office, and Mr. Wallace was there. I think Mr. Wallace was there on every occasion that we ever had any conference about this case, except possibly once or twice, maybe once or twice.

Mr. Keenan: I think the District Attorney made it a point to call Mr. Wallace before we started discussing it. That is my recollection.

Mr. McGohey: I think that is so, because Mr. Wallace was the man who conducted the original investigation.

Mr. Keenan: That is right.

Mr. McGohey: In any event, it is a fact, as Mr. Keenan states, that in December he said he had discussed this matter with his clients, that he believed 1029 that they were the victims of extortion, and he asked if he might bring them down and have them state their story fully and subject to any examination which the District Attorney wished to make. And if my recollection is fully clear—I had no note on it either—I have a recollection that Mr. Keenan said he would even be willing to let his clients be examined without him being present, but of course he would prefer to

be present, and I said to him that if the examination was held it would be in his presence. And we talked about it for some considerable time, I would think probably an hour, that afternoon.

Now, it is undoubtedly true that throughout that discussion Mr. Keenan argued and stressed to me that it was his belief that his clients were the victims of a vicious extortion by Major Radovich, and he said that he was fully convinced that if I could hear their story, told in their own way, and free from any of the nervous tension that might accompany a man in more formal surroundings, that I would be convinced that they had been the victims of extortion.

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But there was never, as I recall it, any statement made that the men had not committed any crime. My recollection is very clear on this, your Honor, and I am relying entirely on my recollection that what Mr. Keenan said was this: these men are now charged with conspiracy, and it is possible, as a matter of law, that the payment of money to an officer under the circumstances which happened in this case might support the charge of conspiracy, but you ought to, as a fair District Attorney, you ought to take into consideration all of the facts and circumstances surrounding it; that it is our claim, meaning the defendants' claim, that they had been extorted under very vicious conditions, namely, that the boys were being

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forced into an outfit immediately to be sent overseas and that under that threat the money was extorted.

Now, I said to Mr. Keenan substantially this, that I didn't believe from what I knew of the facts in this case which had been developed by the investigation up to that time, I did not believe that the evidence sustained the contention that there had been an extortion. I said that to Mr. Keenan then. I have said that continuously. I said, however, "If your clients wish

to come in and you can be with them and any associates you want can be with them, and submit to our questioning, I have no objection to it." I would do that in any case, your Honor. I will give any defendant that wants to come in under those circumstances and tell his story a chance to do so.

I never urged Mr. Keenan to bring them in. I never made the slightest kind of promise as to what would happen or what would not happen. All I agreed with Mr. Keenan was to listen to them. Now, as a matter of fact, at the time we discussed this I said to Mr. Keenan, "I don't know whether I personally will be free at the time they come in to hear their story, 1034
but I shall try when the arrangement is made, when the date is made, to arrange my affairs so that I will be free."

Now, it happened that Mr. Wallace was going into a trial that took five or six weeks, so that it wasn't until February that he was free of his engagement, sufficiently free, to fix the date for this hearing or this conference; and on the day that they were to come in he informed me of it, and I was tied up at the time and didn't get in until some time part way through—I don't recall now whether it was halfway through or a quarter of the way through, but the minutes would show when I came into the conference.

But I can't conceive of any statement, your Honor, that was made more voluntarily than these were. I 1035
never talked to the Bayers from the day I saw them at their arraignment until the day I saw them in Mr. Wallace's room some time in February, whatever date that statement was made. There was no inducement of any kind, there was no urging of any kind. And when the statements were taken, and the transcript can also show that, it was explained to each of these men clearly that they were making the statement

voluntarily, they were making it after consulting with their attorney, that their attorney was present in the room, and he was throughout the whole questioning of both defendants, and that they understood that anything that they there stated, any statement there made, could be used against them. The transcript of their questioning clearly shows that.

Now, I do not for the life of me, your Honor, see how anybody seriously can argue that those facts lay a basis for which anybody could infer an inducement, which I understand to be Mr. Keenan's argument, because he is not claiming that I made any formal
1037 offer or offered any inducement; he says that those facts are such that they would support an inference of inducement.

I understood that that was your point, Mr. Keenan. But certainly, your Honor, there was at no time anything connected with this hearing or this questioning or these statements or admissions which came as a result of any action on the part of the United States Attorney. I was merely acquiescing in the request of counsel throughout.

Mr. Keenan: May I ask Mr. McGohey before he sits down, because I know he is a very fair man, if he will not advert to that very point of the subject matter I brought up, about a divergence of views between himself and Mr. Wallace, as to whether or not
1038 the facts, as I have stated, would constitute an offense in any event? Because I am very sure that I did not imagine that; that was brought right from the start. And, furthermore, I have attempted to make my position clear, and when Mr. McGohey said he doesn't see how anybody under the sun could make any such contention, let him turn around in his chair and let him take a good look at me, because I am making it, that under the law there was clearly what is tantamount

to such an inducement, and I don't want—I beg to have the absence of a play upon words, on "voluntary" —let it be established clearly, these men were not coerced into coming, they came because I suggested it. Consequently I was there before the questions were asked, during all the time the questions were asked and afterwards, and I do say there was more than an implication—there was to me—what amounted to a direct statement, that if it was extortion, and if their story was true, that there would not be a prosecution. That was my understanding.

Mr. McGohey: Well, your Honor, I must ask leave at this time to interrupt Mr. Keenan——

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The Court: One at a time.

Mr. Keenan: I hoped, too, that that would not be a violent assumption, that it would take place in the office of any United States Attorney throughout this country, that if people were victims and subjected to extortion, under this law they would not be prosecuted. I would not think that I was doing anything more than paying a compliment to the District Attorney instead of riling him up by that statement.

The Court: Have you anything further?

Mr. McGohey: I have the very definite statement to make, your Honor, that the discussion, as far as my recollection is concerned, never got to that point. I agreed with Mr. Keenan that Mr. Keenan could bring in his client and let them have a full hearing. It is true that Mr. Keenan pointed out to me that in his belief it was his firm belief that these men had been the victims of extortion. And it is true that Mr. Keenan argued to me that in the performance of the duty of my high office, and in the fullest observance of my oath, that if he was able to convince me, or, rather, if his clients were able to convince me that they had been the victims of extortion, that he believed

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I as an officer of the Court should not prosecute them. That undoubtedly was argued. But I insist, your Honor, that I never made any commitment. I hope I am a good enough lawyer that I won't make a commitment until I know what I am making a commitment about.

Mr. Keenan: Your Honor——

Mr. McGohey: May I be allowed to finish, sir.

Mr. Keenan: All right.

Mr. McGohey: I definitely made no such commitment, your Honor. And as far as the divergence of views between Mr. Wallace and me, for whatever weight that might have, I am not aware that at any 1043 time there was any divergence of views between Mr. Wallace and me. There was at no time that I recollect that Mr. Wallace suggested that we ought not to allow these defendants to come in and make such statement that they wanted to make in the presence of their attorney as to what prosecution was going to follow. I never made a commitment.

Mr. Keenan: I would like to have this go on the record because I want to state frankly that whatever ruling is made I want to preserve my rights so that there will be a proper appeal, so I think I would have to ask permission to take the witness stand and reiterate my statement so that it would be a matter of testimony rather than a statement.

1044 The Court: No. I have th idea. Let it be ordered that the Court treats the statement by Mr. Keenan and Mr. McGohey as sworn testimony, and it is ordered that it be incorporated in the record of this case.

Mr. Keenan: Thank you, your Honor.

The Court: Now, have you finished with what you have to say?

Mr. Keenan: I just want to add this one thing, the statement—it is hoped that I still remain in the

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category of acceptable lawyers—that, just as Mr. McGohey said, he never would give his statement of what he would do until he heard the evidence. I didn't ask for any commitment from him as to what he would do. I tried to make that plain. There is a distinction, your Honor, between a man making a commitment of what he is going to do as to prosecuting or not and his making a statement as to his belief as to whether or not he should prosecute a case if it is extortion instead of bribery. And the divergence of views between Mr. McGohey and Mr. Wallace was not as to whether or not these people should be permitted to come in and give their statement. Anyone 1046
who knew Mr. Wallace long enough would know that he never would object to anybody making a voluntary statement against himself at any time. But the divergence of views, and I challenge his statement to the contrary, and I am not making up that statement in this courtroom, there was a divergence of views upon the legal effect of this testimony if it was as I had sketched it out. Let that be denied.

The Court: All right, gentlemen. I rule that there was no inducement offered such as to render the statement inadmissible. All right. Now, do you gentlemen wish to be heard?

Mr. Keenan: May I have an exception to your Honor's ruling?

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The Court: Yes. On the matter of the admissibility of this statement further than you were on Friday?

Mr. Ansell: Not for the reason that constitutes the basis of your Honor's ruling. I think there are other grounds.

The Court: Precisely. That does not finally solve my problem. That is just one phase. As to the general question of its admissibility, of the admissibility

of the statement, if you wish to be heard, I will hear you.

Mr. Ansell: Yes. I have forgotten, your Honor, how far my side, if I can call it such, had proceeded with your Honor on Friday.

The Court: Well, I will state what is in my mind generally. I think I must take the statement which is about to be referred to and about which evidence is offered, as having been made either after the termination of the alleged conspiracy or not pursuant thereto. Possibly both. Therefore, the general rule is that the statement would be inadmissible as against
1049 other defendants, that is, defendants other than the person making the statement. Also, the general rule that any confession or statement against or admission against interest is admissible as to the person making it. Now we are that far.

Mr. Ansell: Yes, your Honor.

The Court: Where does that leave me in the particular situation here presented?

Mr. Ansell: That accords with my thought as to what occurred. Now, your Honor, may I be heard, if you please, upon the ground against the admissibility of this statement, upon the ground that there has been no conspiracy proved so far in this case?

The Court: All right.

Mr. Ansell: And then I want to go further, and I
1050 hope I might be brief, but it is difficult for a lawyer at a critical stage of the case to be very brief, that there has been no evidence of an overt act here.

Over the week-end, if your Honor please, we have endeavored as best we could to summarize the testimony already taken in this case in order that we ourselves might be honestly advised, and that we might with equal honesty present the questions that we are going to present to your Honor.

I say with considerable assurance—your Honor, of course, will remember that I am an advocate in this—that there was no substantial evidence of any group agreement. The evidence shows that Radovich was seen only twice. The first time was when Mr. Elias Bayer took him to get a uniform with some other officer. I remember Colonel Vidal and another was there. Your Honor I am sure will remember. The second time was when Major Radovich and other officers attended a birthday party of Elias Bayer. The Government witnesses consisting of at least some if not, most of the officers who were present upon the two occasions where Radovich was present, testified that 1052
there was nothing wrong, they saw nothing wrong, they heard nothing wrong.

I was impressed with a remark, if it registered correctly with me, made by your Honor—a question whether there might not be found in the matter of the transfer of these men into the Commando group, and then, after a few days out of the Commando group, as to whether there might not be found some evidence of a group agreement or understanding. I may not be relating your Honor's statement correctly.

The Court: I made such a query, sir, and it is still very pertinent in my mind.

Mr. Ansell: I thought it was. I wanted to say, your Honor, that the evidence was that this Commando group to which these men were transferred was a 1053
suicide group. I myself never knew of but one before, but they had a lot of them in this war. A suicide group which men joined through volunteering or giving their consent, and in such a group they could go back, withdraw from the group whenever they pleased, probably before the group left this country. About that I don't know. It was testified to by Miss Goertz that people were transferred into this group. I got

the idea, daily; and frequently, maybe just as frequently, people were transferred out of this group. It was her testimony that there was no evidence of anything wrong that she knew anything about. Then why were they transferred out so soon?

Colonel Boebel was on the witness stand—he was the adjutant of this Commando group, an officer who impressed me as of rare intelligence and soldierly qualities; Colonel Boebel testified that when he saw these men down there at Goldsboro he recognized them as men of whom he had not formed a good impression as to their soldierly qualities when he knew them up here at Mitchel Field. And he asked Radovich, as I remember, what these two men were doing there, and Radovich said, as I remember his testimony, that he had transferred them at the request of Colonel Jacobson. Whereupon Colonel Boebel said in effect: I don't want them here.

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Now a statement like that in the Army—I think that many of us have served in the Army, your Honor, Mr. McGohey, and I even longer—the statement of the commanding officer, the adjutant in charge, to the effect that "I want a thing done" is tantamount to an order that it be done. I think it is true that Colonel Boebel ordered Radovich to transfer those men out and that he did so. I am quite aware, of course, that throughout human life there are things which we may regard as suspicion, but when you begin to talk evidence you are in an entirely different field, and suspicion does not enter the requirements. They were transferred in and, under the circumstances related, they were transferred out. I think it would be going far afield, I think it would be wrong, I think it would lead to the conviction of the innocent, for us to spell out of the plain testimony so far adduced that there was the slightest evidence of corruption.

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I come down to the evidence of overt acts. There are, I think, eight charged here. The overt act in a Federal indictment of this kind is of the utmost importance; it is a statutory requirement. Of these eight overt acts, your Honor, I can't discover from the summary and study of the evidence made any attempt to prove any but the first, fifth and sixth—first, fifth and sixth.

In the first one—your Honor doubtless has the indictment before you—it had to do with a conversation in April, 1943, that Eli Bayer—I suppose that is Mr. Elias Bayer—had with Harold Busch. Harold Busch's testimony, and indeed all the testimony I find upon 1058
the substance of that overt act I have in my summary here, Harold Busch testified that he was a partner in the Buss Company, a brother-in-law of Bayer; I know Vidal, Jacobson, Roeser, Engelhardt and Radovich. They were introduced at my shop by Elias Bayer. Elias brought in Radovich and told me to make him a uniform. I think he brought others in at that time. He brought four or five or more. Elias said that Radovich would pay for the uniform. I made uniforms for Radovich and other officers. Plymouth Dress paid for them. In July or August, 1944, Sam Bayer asked me how I had entered the payment on my books and I told him that the books showed the uniforms were paid for by Plymouth. He asked me to change the books to show that the uniforms were paid for by the 1059
men themselves, and I made the changes. Sam was with me when I made the changes. I am friendly with Sam Bayer. My business is a small business.

"The first time I was brought to the District Attorney's office by the F.B.I., I was held for ten and a half hours. No questions raised when Elias said Radovich would pay for the uniform. Summer uniform $35, Winter uniform $45. Our business was not large, and when I didn't receive money from Radovich I got

in touch with Plymouth and asked them to pay because I needed the money. I asked them to pay because they brought the officers in. But Radovich brought back his uniform. A bill for the uniform was in each package. The price was wholesale. This price was given to people who are recommended. Now, Radovich, being an odd size, we had to peddle out his uniform in pieces. I expected the officers to pay for these uniforms. Engelhardt did not take his uniform."

So far as I am able to state now, that is all the evidence with respect to overt act one.

I will direct your Honor's attention to overt acts 5 and 6, since they may be taken together, at least so far 1061 as the evidence touches upon them. Your Honor will observe that it is said that Bayer, Sam Bayer, had a telephone conversation with one Joseph Busch and about August, 1943, the same month, defendant Sam Bayer entered a taxicab outside the Hotel Governor Clinton, in New York. Joseph Busch testified, according to my summary, as follows:

Uniform manufacturer, I. Buss Company. Brother-in-law of Sam Bayer. Major Morris Saffron is a customer. In 1943 Major Saffron, Sam Bayer and I had lunch in a restaurant near 39 Whitehall Street, where Major Saffron was stationed. Saffron asked how Sam's boys were and how my son was, and that was all there was to that. In August, 1943, I met 1062 Sam Bayer and Major Saffron at the Governor Clinton Hotel. Previously Sam had called me and said the boys were being transferred and asked if I would call Major Saffron and see if he would do something for me or find out what happened over there. I made an appointment with Major Saffron for that evening at the Governor Clinton.

I met Sam and Major Saffron at the Governor Clinton, and Fabbricatore was with Major Saffron.

Bayer waited outside. Saffron, Fabbricatore and I went up to the balcony where Saffron and Fabbricatore talked about five minutes out of my presence. Then Fabbricatore and Saffron left the hotel and in a few minutes Saffron came back, and he and I walked outside and met Bayer. The three of us took a cab at Bayer's suggestion, drove around about 15 minutes. Bayer asked Saffron, "If there is anything that could be done for him about the boys," and Saffron said, "Nothing". Saffron said there was a rumor around the field that Bayer had spent a lot of money. Then we separated at the Pennsylvania Station, and that was that.

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I presume no two human beings ever exactly agree; that is impossible, because it cannot be reduced to mathematical terms and measures. I feel it my duty to say that this record from my point of view contains no evidence of any overt act. The other five overt acts charged in this bill are not even touched upon.

I wanted to invite your Honor's attention upon the question of proof of conspiracy and the relationship of the admissibility of confessions with reference to it to the case of Tingle v. United States, 38 Fed. (2d) 573. Of course, it constitutes authority, but it seems to me to constitute reasonable, persuasive and positive authority upon this point. My attention is struck at this moment by the fact that there was nothing in the confessions which indicated conspiracy and nothing in the independent testimony other than that of persons at the warehouse of the employer. Of course, this was one of those whiskey cases, whiskey in a warehouse, and the owner of the warehouse was undergoing indictment. Knowledge without some evidence of participation is not enough. It must be remembered that appellants introduced no witnesses. The evidence was unconflicting and was that of the Government alone,

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and in such case when the circumstances relied upon are as consistent with innocence as with guilt, they are robbed of all probative value.

With respect as to how far, if this admission should be admitted, Radoyich would be bound or prejudicially affected by it, I wish to make the further arguiment: When did this conspiracy assume existence? When did it end? Of course, as a mere matter of garnishment it is said that it ended with the filing of the indictment. That is meaningless. When did it end in fact? It seems to me that this conspiracy, if it existed, ended when it was proved to be either a success or
1067 failure. It ended, in military language, also the language of logic, when the objective of that conspiracy was attained or failed of attainment. The object of this conspiracy as charged was to effect the transfer of these boys. That with other elements is the gist of this conspiracy.

I am quite unable to see how it can be said that after these boys were transferred, as proved by the Government here, and finally found as a result of those transfers a safe haven, that being the object of the conspiracy, the conspiracy then and there ended.

In the Logan case, your Honor, a case that I had to study for a particular reason assiduously in law school days, Justice Gray was talking about that very subject. It is an interesting case, a long opinion, went
1068 into all sorts of constitutional law; and coming down to the very question involved in this case he said—I had it here, I haven't got it now—near the end of the case he said that conspiracy must have ended when this development of riot and murder and all took place which was charged to be the object of the conspiracy, and declarations made thereafter by any defendant having reference to a passed fact or admission or transaction cannot be said to have been made in fur-

therance of the conspiracy. That is, the admission made after the conspiracy could not relate back.

I suppose I have taken up a lot of time, your Honor. It is of great interest to me and of critical importance to my clients.

The Court: Gentlemen, I have heard the arguments of counsel with great interest. On the first proposition asserted by the distinguished counsel who has just resumed his seat, I find myself unable to agree. It is not for me finally to determine whether or not a conspiracy has been proven or not, but, as Mr. Keenan suggested, it is incumbent upon me now to determine, as the Court, whether or not the evidence is sufficient 1070
to prove a conspiracy, and as to that question I have no doubt. I do not feel any hesitancy about coming to that conclusion at all.

Now as to the question of the admissibility of the statement which is tendered, I am going to admit, I think that under the circumstances which I have previously related it does not constitute admissible testimony as against others alleged to be conspirators other than the person making the statement, and I am going to so limit it in my statement to the jury. But as to the person making the statement I am going to admit it.

Mr. Keenan: Your Honor, may I ask if the Court in determining that point passed upon the issue of fact of what occurred in the conversations between the 1071
District Attorney and myself, or whether the Court took, as I understood it, that—conceding that what I said was true, it would not constitute what your Honor thought in the law raised the presumption or created an inducement in the law?

The Court: I found no serious conflict betwixt you and the United States Attorney. There are some dif-

ferences, possibly, in the inferences which each of you drew from a conversation which it is agreed took place. I find upon neither your statement or the United States Attorney's statement is there anything which would render this testimony inadmissible.

Mr. Keenan: Even though such statements be considered as being under oath?

The Court: That is true.

Mr. Keenan: Thank you, your Honor.

The Court: And you gentlemen, of course, may except if you desire.

Now I want to take a short recess, gentlemen. Are you ready to go ahead in ten minutes?

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Mr. Keenan: May I ask your Honor whether you have used the expression that you are going to admit the statement? Does that mean that you are going to permit this witness to give a recitation of some parts of it as he recalls, or the statement in its entirety?

The Court: I am going to permit the witness to testify to statements made in his presence. If counsel at the conclusion of his testimony, any counsel, don't think he has testified as to all the statement which is admissible and material, I will permit you to interrogate him and bring that out. If you are still not satisfied, I will consider any further requests you have to make.

Mr. Robb: May I have an exception to your Honor's ruling and on the statement, if your Honor please?

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The Court: Yes, sir.

Mr. Keenan: And we want an exception, too, your Honor.

The Court: Yes, exceptions may be noted.

Mr. McGohey: If your Honor please, with respect to the statement, the Government is prepared to put in the full statement, either as transcribed by the stenographer——

The Court: I would not permit the Government to put in the full statement for the reason that the statements which I have read are prolix and contain a substantial amount of matter which is immaterial and irrelevant. If at the conclusion of this witness' testimony defendants, or any of them, wish to introduce the full text of the statement, I will consider that when we get to it.

Mr. Keenan: Could we have the record show, your Honor, what statements your Honor examined, that you referred to?

The Court: I have examined statements made by Samuel Bayer, Elias Bayer and the defendant Radovich. 1076 If you wish the dates, the District Attorney can give them to you.

Will you be ready to proceed in ten minutes?

Mr. McGohey: Yes, I think so.

Mr. Robb: If the Court please, we have not seen those statements to which your Honor referred as those which you had examined. May we have copies of those?

The Court: I don't think it necessary to require the Government to produce the statements. You are not taken by surprise. Your associate counsel, Mr. Keenan, was present throughout the taking of his clients' statements; you were present at the court-martial trial of your client, and I don't understand that there is anything to take any of you by surprise. 1077

Mr. Robb: It occurs to me that if the Court examined them counsel should also have them.

The Court: It does not so occur to me. I examined them for the purpose of determining whether or not I should admit evidence with relation to them. There are many instances when the Court may properly——

Mr. Robb: I bow to your Honor's ruling. May I have an exception to your Honor's ruling?

Mr. Keenan: May I have an exception to your Honor's reference, with great respect, both to your Honor and to the distinguished General Ansell and his colleague, that we are associate counsel. We are not associate counsel.

The Court: The Court used that word inadvertently and retracts it. I understand——

Mr. Keenan: Nor have I any knowledge of what was contained in the Radovich statement, nor have I ever seen it, nor have I been tendered a copy of the
1079 statement that was made back some time in January or February of this year. And I was present only at a part of the court-martial and was respectfully requested to leave during other parts of the proceeding, through no fault of my own.

The Court: I assumed that.

Mr. Keenan: And I am caught by surprise in that I do not claim, and I say this seriously, your Honor, that I have any unusual memory and I do not purport to remember everything that is in the statement accurately, and since I assume that your Honor is referring to a stenographic statement that was purported to have been taken down by competent reporters and transcribed, and it was of considerable length, I take
1080 exception to your Honor's failing to require us to get a copy and, with the greatest respect to this Court, to this Court examining those without counsel—without myself having the right to inspect them or knowing what is in them, or testing their accurateness with even my own memory. And I take exception to your Honor taking any consideration in passing upon any phase of this case instruments so delivered to your Honor.

The Court: Very well.

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Mr. Ansell: If your Honor please, and with the utmost respect for your Honor, and this is not a formality, I doubt that his Honor should have read this statement of Bayer, I doubt that your Honor should have read the statement of Radovich, and while for the moment I don't remember the scope of our exception, may we have an exception to that?

The Court: Certainly, sir.

I do want to repeat that the use of the word "associate" was entirely inadvertent. I definitely understand that you, Mr. Keenan, represent the defendants Bayer, and you gentlemen, General Ansell and Mr. Robb——

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Mr. Keenan: And I would like to have the record show that it is recognized that there is a distinct divergence of interest, as your Honor will understand, between counsel.

The Court: Yes. My use of the word "associate" was inadvertent and had reference to your physical contact and social contact.

Mr. Keenan: Since the jury is not here, we withdraw any claim that there is any error in that.

The Court: The Court will take a ten-minute recess.

(Short recess.)

(The jury entered the court room.)

Mr. McGohey: Your Honor, I should like to ask at this time to ask permission to withdraw the witness, please, and ask your Honor's permission to put another witness on the stand who has just come into New York last night. That is Colonel Jacobson. He is suffering from an illness of some kind. I believe his testimony will be quite short.

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The Court: All right, sir, call him.

Mr. McGohey: Colonel Jacobson.

1084 *Alfred H. Jacobson—For Government—Direct.*

Mr. Ansell: Before proceeding with that witness, your Honor, may we approach the bench, counsel for all parties?

The Court: Yes, sir.

(The following proceedings took place at the bench, without the hearing of the jury:)

Mr. Ansell: If your Honor please, we want to move for the withdrawal of a juror and a mistrial in this case grounded upon the fact that your Honor has read the statement of Sam Bayer.

The Court: All three defendants.

Mr. Ansell: Of all three defendants.

1085 The Court: All right, sir. Motion overruled.

Mr. Ansell: Thank you, sir.

Mr. Robb: Exception.

Mr. Keenan: We take an exception on the same ground.

The Court: Very well.

Mr. Keenan: We join in the same motion.

The Court: That is all right.

(The following proceedings took place within the presence of the jury:)

ALFRED H. JACOBSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

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Direct examination by Mr. McGohey.

Q. Colonel Jacobson, where do you live at the present time? A. In Albany, New York.

Q. You are an officer of the United States Army, are you not? A. I am.

Q. What is your present duty status? A. Terminal leave, pending retirement.

Q. How long have you been an officer of the United States Army? A. Since 1932.

Q. Did you enter on active duty at that time? A. In 1933 I entered on active duty.

Q. Have you been on active duty continuously since 1933? A. I came on active duty under the emergency in 1940, September 25, 1940.

Q. In the year 1943 were you assigned to duty at Mitchel Field? A. I beg your pardon, sir, I didn't hear the question.

Q. (Read.) A. Yes, I was.

Q. About when did you come to Mitchel Field, Colonel? A. September 25, 1940.

Q. You remained there until when? A. Until June, 1943. 1088

Q. Do you know the defendant Samuel Bayer? A. I do.

Q. Do you see him in the court room? A. I do.

Q. Is he one of the gentlemen sitting here (indicating)? A. Yes. He is the gentleman on the right.

Q. Do you know the defendant Elias Bayer? A. I do.

Q. Do you see him here? A. Yes, sir. He is the gentleman on the left.

Q. Sitting over here (indicating)? A. Yes, sir.

Q. Do you know the defendant Major Radovich? A. I do.

Q. Do you see him in the courtroom? A. I did when I came in. He is sitting at the table there (indicating).

Q. Over here on the right? A. Yes.

Q. Will you tell us when you first met the defendant Elias Bayer? A. After the first of the year 1943.

Q. Where did you meet him, Colonel? A. The first time 1089
I met him was in the—to the best of my recollection it was in the entrance to the Madison Square Garden, at a fight, I believe.

Q. Would you try to keep your voice up a little louder, Colonel? It is difficult for the last juror and for counsel to hear you. A. I am sorry.

Mr. McGohey: Would the stenographer read that answer, please.

(Answer read.)

Q. Were you introduced to him by anybody, Colonel? A. Yes. By Colonel Vidal and Captain Roeser.

Q. Was it after the fight, did you say? A. I believe so, yes, sir.

Q. Did you spend any time with him that evening after you met him? A. I don't remember whether I did or not.

Q. Do you recall whether you went out any place together? A. I don't think the first night that I met him that I did. I am not certain about that.

1091 Q. Thereafter did you see Elias Bayer from time to time? A. Yes, sir, I did.

Q. Did you attend social affairs with him? A. Yes. I became very friendly with him.

Mr. Ansell: Couldn't he talk a little louder?

Mr. McGohey: General, it would help you if you took a seat up here at my table.

Mr. Ansell: I don't think that answers it very well.

Mr. McGohey: I have asked the witness to please keep his voice up loud enough so that all the gentlemen here at the counsel table can hear him.

The Witness: Yes, I will.

1092 Q. It is very important, Colonel.

Mr. McGohey: Will you read the answer.

(Answer read.)

Q. Did you visit at his home? A. Only on one occasion.

Q. Do you recall who was there besides Elias Bayer? A. I believe his sister or—his niece. His niece.

Q. Anybody else? A. Not at his home, no.

Q. Do you know if he had an apartment in New York? A. Yes, he did.

Q. Did you ever visit him at that apartment? A. Yes, I did.

Q. Did you ever attend social affairs at the apartment? A. Yes, I did.

Q. Can you describe when was the first time you attended a social affair at his apartment? A. Shortly after I met Mr. Bayer.

Q. Can you tell us who was at that affair? Please keep your voice up, Colonel. A. Well, there was Colonel Vidal, Captain Roeser and Mr. Goldstein—and Mr. Goldstein. I don't think anyone else was there at that time.

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Q. Were there any other officers from Mitchel Field other than those you mentioned there? A. No, sir.

Q. Was Samuel Bayer there? A. No, sir.

Q. When was the first time you m t Samuel Bayer? A. At his place of business.

Q. I say when, Colonel? A. When? Several—oh, I think it was six weeks or two months after I met Mr. Elias Bayer.

Q. Some time in the spring——.

Mr. Keenan: I didn't hear the answer.

(Answer read.)

Q. Were you introduced to him by anybody? A. By Mr. Elias Bayer.

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Q. Do you know a uniform company in New York known as the I. Buss Uniform Company? A. Yes, I do.

Q. Did you ever order a uniform from that company? A. I did.

Q. Were you introduced to the I. Buss Uniform Company by anybody? A. By Mr. Bayer, Mr. Elias Bayer.

Q. Which Mr. Bayer? A. Mr. Elias Bayer.

1096 *Alfred H. Jacobson—For Government—Direct.*

Q. Did you ever have any conversation with Samuel Bayer about ordering a uniform from the I. Buss Company? A. No, I didn't.

Q. Did you get a uniform from the I. Buss Company? A. I did.

Q. Did you pay for it? A. No, sir.

Q. Do you know who did pay for it? A. I was told by a Mr. Buss that——

Mr. Keenan: I object.

The Court: Objection sustained.

Mr. Ansell: I didn't get the answer.

The Court: Objection sustained.

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Q. Well, subsequent to receiving your uniform, did you have any conversation with either Elias Bayer or Samuel Bayer about that? Will you please keep your voice up, Colonel.

Mr. Keenan: Your Honor, I don't like to repeat objections, but I think we ought to separate which one he talked to, because I want to save my exception as to the man that was absent.

The Court: He is being asked if he had any conversation with either one.

All right, go ahead.

The Witness: I am sorry, I have to have the question read. I have forgotten what you asked me.

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Q. I asked you if after you received your uniform from I. Buss Uniform Company, after that did you have a conversation with either Samuel Bayer or Elias Bayer about the receipt of that uniform? A. Yes, I did.

Q. Well, now, you had a conversation? A. Yes.

Q. With whom of those two men? A. With both of them.

Q. They were both present during the conversation? A. Both present.

Q. Will you tell us what was said? A. Well, I had found that the uniform had been paid for and I thanked them for it.

Q. What, if anything, did either of them say? A. They said——

Mr. Keenan: Just a minute. Did both of them say it at the same time? I would like to know what the conversation is. We are getting a little loose around the courtroom, and I would like to know what——.

Mr. McGohey: I object to that. I think the statement is that they were both present at the conversation.

Mr. Keenan: Yes, but they both couldn't have made the statement at the one time. 1100

Mr. McGohey: I didn't ask that.

The Court: You don't have to comment on that.

What did either or both of them say and, if so, which one? You said you thanked him. What did they say? And specify which one.

The Witness: Well, I don't remember which one said it, but they said, "Well, that's all right, the Busses are indebted to us, they are relatives, and they are indebted to me."

Q. When you were at Mitchel Field in 1943, to what unit were you assigned, Colonel? A. The First Fighter Command.

Q. Were you with the First Fighter Command during 1101
all of 1943? A. No. Yes, during all—yes. I am sorry. During 1943.

Q. All of 1943? A. Yes, I was.

Q. Did you know two enlisted men in the First Fighter Command, one named Private Martin Bayer and the other Private Melvin Usdan? A. I did.

Q. Do you know when they first came into the First Fighter Command? A. I do.

Q. When was that? A. That was during the spring of 1943 they joined the Fighter Command.

Q. Now, at the time that they came into the Fighter Command, who was the commander of the First Fighter Command?

Mr. McGohey: Well, I withdraw the question.

A. General——

Mr. McGohey: I withdraw the question, if your Honor please.

1103 Q. When they came into the First Fighter Command, do you know to what unit of the First Fighter Command they were assigned? A. They were assigned to the Operations Section, Fighter Command. They were, of course, members of the Headquarters and Headquarters Squadron.

Q. Do you know who at that time was the commanding officer of the Headquarters Squadron of the First Fighter Command? A. It was either an officer by the name of Jones, Charles D. Jones, Lieutenant-Colonel Charles D. Jones or Major Radovich. I don't remember which.

Q. Was Major Radovich a member of the First Fighter Command? A. Yes, he was.

Q. Was he a member of the Headquarters Squadron of that Command? A. Oh, yes. We all were. Everybody in
1104 the First Fighter Command.

Q. Do you recall whether or not in the year 1943 the Women's Army Corps came in and were assigned to duties at Mitchel Field? A. Yes, they were.

Q. Do you recall approximately when in the spring of 1943 that occurred?

Mr. Keenan: I object to the leading form of the question, your Honor.

The Court: Objection overruled.
Mr. Keenan: Exception.

A. That was during the month of April, I think—no, it wasn't either. I don't remember——

Q. Well, can you tell us— A. April, I believe it was. Yes, I believe it was in the month of April.

Q. Well, now, can you fix any more definitely the time when the two privates, Bayer and Usdan, were transferred into the First Fighter Command? A. I do not know the date. It was in April, I believe.

Q. Well, can you tell us whether it was at or about the time that the Women's Army Corps was coming in to take 1106
over duties? A. Oh, yes. It was just prior to their assignment to the field at base headquarters, where the—Bayer and Usdan, Privates Bayer and Usdan were then assigned.

Q. You mean Bayer and Usdan were assigned to the base before they were transferred to the First Fighter Command? A. That is right.

Q. Do you know what duties the Women's Army Corps were assigned to when they came in? A. Clerical duties.

Q. Do you know what classification these two soldiers, Bayer and Usdan, had? A. They were clerks.

Q. Were they transferred as clerks into the First Fighter Command? A. Yes, they were.

Q. Now you are married, are you not, Colonel? A. I
am, yes. 1107

Q. Were you married in the spring of 1943? A. Yes.

Q. Did you ever introduce your wife to Major Radovich —withdraw that—to Samuel Bayer? A. Yes.

Q. And did you meet Mrs. Bayer? A. Yes, I did.

Q. Did you go out with them socially? A. On one occasion, yes.

Q. When was that, Colonel? A. In the spring of 1943.

Q. Was it around the time of your birthday? A. It was, yes.

Q. Will you tell us when your birthday is? A. April 21st.

Q. It was on or about that time that you— A. It was, yes.

Q. Will you tell us where you went that evening? A. To the Waldorf Roof.

Q. Was that the Starlight Roof of the Waldorf Hotel? A. Yes.

Q. They were present, yourself and your wife; is that correct? A. Yes, that is correct.

Q. And Mr. Samuel Bayer and his wife? A. That is right.

1109 Q. Was there anybody else present? A. No; there was not.

Q. Now, before you went to the hotel that night did you meet Mr. Bayer? A. I did.

Q. That is, Mr. Samuel Bayer? A. That is right.

Q. Where did you meet him? A. At a gas station on 21st Street, I think it is, to the best of my recollection.

Q. Do you know where that gas station is located with respect to Mr. Bayer's office? A. It is diagonally opposite.

Q. Across the street from it? A. That is right.

Q. When you met Mr. Bayer there, will you tell us what happened? A. Well, I parked my car in—we got a cab and went to——

Q. Would you keep your voice up, please? A. I parked

1110 my car and we got in a cab and went to the hotel.

Q. Did you park the car yourself? A. I did.

Q. Did you have the keys for your car? A. I did, yes, sir.

Q. Did you give them to anybody? A. Yes, sir, I gave them to Mr. Bayer.

Q. And had he asked for them? A. Yes.

Q. Then, as I understand it, you got in a cab and went to the hotel? A. That is right.

Q. Now, when you left the hotel that night, did the four of you leave the hotel together? A. Yes, we did.

Q. Where did you go after you left the hotel? A. We got into a cab and dropped Mr. and Mrs. Bayer at another hotel, they were staying for the night, and then I went back to the gas station.

Q. Now, in the meantime had you received back your keys from Samuel Bayer, the keys for your car? A. No. They were left at the gas station.

Q. They were left at the gas station? A. Yes.

Q. All right. Now, you got back to the gas station, and then what happened? A. I got in my car and drove out, started to drive back to Mitchel Field. Then I noticed the car was driving——

Q. Would you keep your voice up? A. I noticed the car 1112
was driving oddly, and I got out and I looked at it, and there were new tires on the car, four new tires.

Q. Four new tires? A. Yes. And they had been—prior to that I hadn't been coming into town, and the reason for it was I didn't have—that is, I was asked why I didn't come in more often, and I explained the reason I couldn't come in was that my tires were bad. And I got out at this time—

Mr. Robb: May we find out who is talking in this conversation?

The Court: Whom are you talking about?

The Witness: Oh, I had talked to Mr. Bayer.

Mr. Robb: Which Mr. Bayer?

The Court: Which one?

The Witness: I do not really remember. I know I 1113
talked to one of the Mr. Bayers. And that, then, as I say, I got out of the car and examined it and found the new tires on the car, four new tires.

Q. Had you purchased those tires? A. No, I did not.

Q. Did you pay for them? A. No, I didn't.

Q. Subsequent to that evening when you got the four new tires on your car, did you have a conversation with Samuel Bayer with respect to those tires? A. No.

1114 *Alfred H. Jacobson—For Government—Direct.*

Q. Did you have a conversation with Elias Bayer with respect to those tires? A. No.

Q. At no time after you received those tires were they ever mentioned by the Bayers? A. Well, the next day I called him up and said——

Q. You called whom up, Colonel? A. I called up the office of Sam Bayer.

Q. Whom did you talk to there? A. I believe it was Mr. Sam Bayer, in fact I am sure it was.

Q. What was the conversation, the substance of it? A. Well, I said——

1115 Mr. Keenan: Your Honor, I assume all of these conversations being taken in the absence of others will not be binding unless in some way or fashion——

The Court: No. I think the evidence is subject to your objection.

Mr. Keenan: I object.

Mr. Robb: We have the same objection, if the Court please.

The Court: Very well, go ahead. Relate the conversation, Colonel.

Mr. Keenan: Exception.

A. (Continuing) Well, I said, "Quite a surprise." He said, "What are you talking about?" And the sum and substance was, "What are you talking about?" And I
1116 said, "The tires. Thank you." He said something about, "Happy birthday," or something like that.

Q. Would you keep your voice up? I have difficulty hearing you myself back here.

Mr. Ansell: May the stenographer, if the Court please, read that back?

(Answer read.)

Q. Now, Colonel, I think you said you left Mitchel Field some time in June of 1943, is that correct? A. Yes, sir, I did.

Q. And were you transferred from Mitchel Field? A. I was, to the command of the Albany——

Q. Will you keep your voice up now? A. I was transferred to the command of the Albany Air Region.

Q. And where was your place of duty? A. Albany, New York.

Q. In the City of Albany? A. Yes, sir.

Q. You remained there for how long, Colonel? A. Until December, 1943.

Q. December, 1943. Now, between the time you left 1118
Mitchel Field in June and December, 1943, did you have conversations with Samuel Bayer at any time? A. Yes, I did.

Q. You came to New York from time to time during that period, did you not? A. Yes, that is right.

Q. On any of your vists to New York from Albany during that period did you see Samuel Bayer? A. Yes, sir, I did.

Q. Did you go out with him socially? A. No.

Q. Did you see Elias Bayer? A. I did.

Q. Did you go out with him socially? A. Yes, I did.

Q. Now I direct your attention particularly to the early fall, specifically, some time in September, 1943, and I ask you, did you have a telephone conversation with Samuel Bayer? A. Yes, I did. 1119

Q. And who made that call, Colonel, you or Mr. Bayer? A. Mr. Bayer.

Q. And will you tell us what Mr. Bayer said to you and what you said to him? A. Well, he called me on this occasion. He was very excited, very upset. From the tone of voice at least I gathered that.

Q. Would you keep your voice up, please, Colonel? A. And he said that the boys were alerted and they were in a

hot outfit and that they were going overseas, and asked me whether or not I could do anything for them.

Q. What did you say, Colonel? A. I said no, I couldn't. I didn't know any way that the—that, as far as I had observed he had been a very indulgent parent, he had done everything in the world for these boys and it was their time to go, and that he would be doing them more harm to hold them or bother them than he could in keeping them back, and that they would just have to go, that I was out, that I knew no one and no way and that there was nothing that could be done and nothing should be done.

Q. Did he say anything to you after you said that to him?
1121 A. Yes. He said that he was—that it pleased him to hear me say that he had been a good father and he had been indulgent with them, and talked a little while longer and the phone cut off, and Mrs. Bayer came on and said, "Sam has fainted, I'll call you back."

Q. And thereafter did you get a call from Elias Bayer? A. Yes, I did.

Q. How long after this first telephone conversation? A. The next day or several days later.

Q. And what did Elias Bayer say to you in that phone conversation? A. He said that Sam was sick, he was pretty bad off, he was very much upset, and the boys' going had him very worried. He said, "Positively nothing can be done?" I said, "No, nothing."

Q. Colonel, in September, 1944, were you stationed at
1122 Mitchel Field? A. No, I was not. In September——

Q. Were you at Mitchel Field? A. Oh, wait a minute now. September, 1944.

Q. September, 1944. A. Yes, I was.

Q. Were you assigned there to duty? A. I was a patient in a hospital.

Q. While you were a patient there did you see the defendant Major Radovich? A. I did.

Q. Where did you see him, Colonel? A. I saw him in—he came down to my room in the hospital.

Q. Was he accompanied by anybody? A. No.

Q. Was there any guard with him? A. No.

Q. Did you have a conversation with him? A. I did.

Q. Will you tell us what he said and what you said, in substance?

Mr. Keenan: I object as far as my clients are concerned, after any purported conspiracy must have come to an end, and in their absence, anyway.

The Court: I will overrule the objection.

Mr. Keenan: Exception.

1124

The Court: As to the admissibility.

The date is what? September, 1944? Do you contend, Mr. McGohey, that that is admissible as against all defendants?

Mr. McGohey: I did not get your question, your Honor.

The Court: Do you contend that that is admissible as against all defendants?

Mr. McGohey: No, your Honor. I claim it is admissible only against the defendant Radovich.

The Court: All right.

Ladies and gentlemen of the jury, I am going to permit the testimony of the statement made by the defendant Radovich but direct you not to consider it as evidence against the other defendants in any 1125
way. I am admitting it for your consideration of the case against the defendant Radovich inasmuch as he himself made the statement. I direct you not to consider it as evidence against either of the other two defendants.

Mr. Keenan: Your Honor, I object on behalf of the two defendants Bayer on the ground that your

Honor has cautioned the jury to do something which in the practical affairs of life cannot be done.

The Court: Objection overruled. Proceed.

Q. I have asked you, Colonel, to give us the substance of the conversation that you say you had with Major Radovich. A. Well, he came in, and of course we passed the time of day, and said hello; I hadn't seen him in some time.

Q. Colonel, would you please keep your voice as loud as you can? A. I am making every effort to.

Q. I appreciate that, Colonel, and I am not quarreling; I am just asking you if you will try to do that. A. We
1127 talked about his predicament; it's a hell of a situation, the way it started, and how in the world did all this happen, about this thing. He said, "I don't know, a crazy thing." He says, "I was going overseas on a very hot job and didn't expect to come back, had the wife and the baby, figured I might just as well take care of them."

Q. Now is that substantially all of what he said to you, in substance? A. Yes, that is about it.

Mr. McGohey: I have no further questions, your Honor.

The Court: All right. You may cross-examine.

Cross-examination by Mr. Keenan.

1128

Q. Colonel Jacobson, would you be good enough to state your age? A. 39.

Q. And would you be kind enough to tell us if your illness is a recent one or if you have been ill for some time? A. I have been hospitalized for two years.

Q. When did you come to Mitchel Field? A. I came to Mitchel Field in 1940.

Q. You stayed there until when? A. Until June, 1943.

Q. And you went from there to Albany, New York? A. I did.

Q. And how long did you stay in Albany? A. Until December, 1943.

Q. Were you hospitalized then? A. No.

Q. And then you came back to Mitchel Field? A. In '44.

Q. Where did you go from Albany? A. I went to Norfolk, took a station at Norfolk, and then I went to Seymour Johnson Field; and I was hospitalized in February, 1944.

Q. Did you say Seymour Johnson? A. Yes.

Q. Where is that? A. North Carolina.

Q. So, those were your movements from the date of the beginning of the war up to the time being? A. No, I would not say that. 1130

Q. Would you indulge me as to when you first came to Mitchel Field? A. I came there in 1940.

Q. Were there some other movements that you made, moving from one camp to another besides that? A. Oh, yes. I went to England in 1942.

Q. You went to England in 1942? A. Yes.

Q. How long were you over in England? A. I was there twelve weeks.

Q. You were in combat service there? A. I was observer in service there.

Q. What is it, please? A. I was attached to the R.A.F. and was acting as observer for air defense problems; and at that time I was and subsequently was attached to 310 Squadron R.A.F., a night fighter squadron as observer. 1131

Q. And you have told us the substance of the conversation about the tires. Were they recapped tires? A. No, they were new tires.

Q. You are sure of that? A. Well, I am reasonably sure. I am reasonably sure they were.

Q. You would know one way or the other, wouldn't you? A. Yes, they were new tires.

Q. They were new tires. Were you asked to do anything at all at the time that these tires were given to you, as you describe them? A. Oh, no. There had been on holidays and birthdays we had exchanged gifts, Mr. Elias Bayer and I; I had given him on his birthday, had given him gifts and——

The Court: I think it is a little too futile to compete with a brass band outside the court house and it is pretty near time for the dinner bell, so I am going to recess now, ladies and gentlemen, until ten minutes past two.

1133 Colonel, during the recess don't talk to anyone about this.

The Witness: No, sir.

The Court: The Court will take a recess until 2.10.

(Recess to 2.10 P. M.)

AFTERNOON SESSION.

ALFRED H. JACOBSON, resumed the stand.

Mr. Keenan: May we have the last question and answer read, please?

(Question and answer read.)

1134

Cross-examination (continued) by Mr. Keenan.

Q. Do you want to finish your answer, Colonel, whatever it would be? A. Well, just that we exchanged gifts on these holidays. Mr. Bayer and I were very friendly, Mr. Elias Bayer, and I thought a great deal of him.

Q. And that friendship continued at least up until the time you left Mitchel Field to go to Albany? A. Oh, yes.

Q. And you wrote Elias a letter in June of 1943, do you recall that? A. No, I don't.

Q. Well, do you remember writing him when you got to Albany? A. I could have. I don't remember. I don't remember it.

Q. Up to the time that you left Mitchel Field to take over new duties at Albany, because that was really why you left, wasn't it— A. That is right.

Q. —to take over another squadron, Colonel? A. An air region, an air region.

Q. Another air region? A. Yes.

Q. And naturally with a new crowd, is that right? A. That is right.

1136

Q. Now, up until the time that you left for Albany at least, were you asked to do anything that you considered in any manner improper? A. No, sir.

Q. Now, I am not asking you, Colonel, at this time, whether you did anything improper, but I am asking you specifically, and I want you to give a lot of consideration to it, were you asked to do anything improper? A. No.

Q. What was the relationship, Colonel, that you had to these two privates, the Usdan boy and Martin Bayer? A. I had no relationship with them at all other than that they were in the headquarters squadron.

Q. Did you have anything to do with where they were in the course of the day or what their particular duties were? A. No, sir.

Q. Did you know what they were doing? A. Yes, I did. 1137

Q. What were they doing? A. They were clerks in the Field Fortification—in the Radar Fortification Section.

Q. Clerks in the Radar Fortification Section, is that right? A. Yes.

Q. Was that useful employment, in your opinion? A. Very, yes, sir.

Q. And I meant by my question, in the course of one day or another would you be personally acquainted with what

either one of these boys happened to be doing on a given day? A. Only in that the Radar Fortification was part of my—had been part of my duty among others, and I had a great number of them at one time, and then as the command expanded, why they became departments, and Captain Roeser was given the Fortification Section, and he had—and these boys were assigned to his Section, and in that way it came under the jurisdiction of my Section, the Operation Section, and at that time it was an unofficial title or job to be given to me of a Section, which had no place properly in the organization, but I was in charge of the responsibility of it in connection with my other duties; that
1139 is, with the whole running of that Section.

Q. And you referred to it as some kind of fortification?

Mr. McGohey: Your Honor, I object to any further questions along these lines. I think it is entirely irrelevant to any issue in this case what the Colonel was doing, or what the boys were doing, beyond what has been described.

Mr. Keenan: Well, do you claim that this man is part of a conspiracy?

The Court: Wait a minute. Please let me rule on it. I am going to overrule that objection. I do not think he has gone too far yet.

Mr. Keenan: Thank you, your Honor.

The Court: Go ahead.

1140

Q. You have spoken about fortification. A. Yes.

Q. Very briefly will you tell us what the nature of the fortification would be?

Mr. McGohey: I object to that, your Honor. It is irrelevant.

Mr. Keenan: I want to get some idea of what these boys were doing there.

Mr. McGohey: I press the objection, if your Honor please.

The Court: Overruled. Go ahead.

A. They were doing general clerical work, filing, and some typing, as I remember it, and general clerical work in this section.

Q. And were you aware of any special consideration that was given to either one of these two boys, Colonel, at any time? A. No, sir.

Q. Before you left for Albany? A. No, sir.

Q. Were they treated, as far as you could observe, like any other privates in the Army? A. They were just soldiers. 1142

Q. Pardon me? A. They were just soldiers.

Q. They were just soldiers? A. Right.

Q. And they took their orders, whatever orders were given to them? A. That is right.

Mr. Keenan: May I mark this?

(Defendants' Exhibit B marked for Identification.)

Mr. McGohey: Are you offering it?

Mr. Keenan: I want to identify it first.

Mr. McGohey: Yes.

Q. I want to know if you ever saw him, Private Martin Bayer? A. This is a picture of him. Is that what you mean? 1143

Q. Yes. Is it a fair representation and likeness of him, as you recall him? A. Yes, sir.

Mr. Keenan: I offer that in evidence, your Honor.

Mr. McGohey: I object, your Honor. It is irrelevant and immaterial to any issue in the case.

The Court: I will admit it. Overrule the objection.

(Marked Defendants' Exhibit B in evidence.)

Q. Did anyone ask you, Colonel, to take them out of the Fighter Command and put them any place else? A. No, sir.

Mr. Keenan: Now, I have referred to the subject matter of letters and I would like to mark this a defendants' exhibit.

(Marked Defendants' Exhibit C for Identification.)

Q. I will ask you to examine Defendants' Exhibit C for Identification, and ask you if you recognize that? A. (No answer.)

1145 Q. Well, I think I will shorten it and I will ask you if that is in your handwriting? A. It is, yes.

Q. And is that a letter you wrote to Elias Bayer? A. It is.

Q. And was it written on or about the date of it? A. It was.

Q. You wrote the date in and I assume it was that date? A. Yes.

Mr. Keenan: Would your Honor care to examine this?

The Court: Has the United States Attorney seen it?

Mr. McGohey: I have not seen it yet, your Honor.

Mr. Keenan: I did not know whether I should hand
1146 it first to you or the Court (handing to Mr. McGohey). Could I have the jury look at the picture while they are examining the letter?

The Court: Yes.

(Mr. Keenan hands picture to jury.)

Mr. McGohey: Your Honor, I object to it as immaterial.

The Court: Let me see it, please.

(Mr. Keenan hands letter to Court.)

Mr. Robb: Have you a copy of that, Mr. Keenan, that we can look at?

Mr. Keenan: I have no copy of it. I haven't even a typewritten copy.

(Envelope marked Defendants' Exhibit C-1 for Identification.)

Mr. Keenan: Will you let that go right with it (handing to Mr. McGohey)?

Mr. McGohey: The objection and the ruling will go to that as well as the letter.

The Court: I will admit them.

Mr. Robb: If your Honor please, could I see it before you admit it? 1148

The Court: It does not refer to your client.

Mr. Robb: It does not refer to my client?

The Court: No.

Mr. Robb: I have never seen it, your Honor.

The Court: It will be admitted.

(Defendants' Exhibits C and C-1 for Identification received in evidence.)

Q. Colonel, I call your attention to the date of Exhibit C, being June 26, 1943, and the place at which it was sent, Albany, New York, and I believe you just read that letter, did you not? A. I didn't completely read it, no; I scanned it. 1149

Q. Scanned it? A. Yes.

Q. Well, with such attention as you did give to it, I will ask you if under date of June, 1943, anything had occurred in any manner in your relations with any of the Bayers, either Samuel or Elias, to cause you to believe that any effort was being made to in any way affect your judgment as an officer of the United States Army? A. No, sir.

Q. Or to get you to affect any other officer's judgment in the United States Army on anything? A. No, sir.

Q. Is that correct? A. That is correct.

Q. And had you received the automobile tires at that time? A. Yes, I had.

Q. And the uniform? A. Yes, I had.

Q. And the automobile tires I believe you referred to as having received on or about your birthday, is that correct? A. That is right.

Q. And what kind of an automobile did you operate, Colonel, so that we can find out something about the tires of such? A. Mercury.

Q. Ford Mercury car? A. Coupe, yes.

Q. Coupe? A. Yes, club coupe.

1151 Q. And was anything said prior to the time that you received the tires, or at the time you received them, or at any time you were at Mitchel Field to hook them up in any way with anything that you expected or hoped to do? A. No, sir.

Q. Or in any way concerned with influencing your judgment as an officer? A. No, sir.

Q. Or you influencing any other officer? A. No, sir.

Q. Or let me put the batter bluntly, Colonel: Was there any effort that you could discern at that time, up to the time that you went to Albany, to get you to tamper in any way with what happened to these boys?

Mr. McGohey: I object to that question.

The Court: Sustained. You ought to ask him about

1152 it.

Mr. Keenan: I will except, your Honor.

The Court: Very well.

Q. Now, how did you happen to get the uniform? Just very briefly will you tell us about that? The distinguished United States Attorney has asked you if you got it, but he left out the details of how it happened.

Mr. McGohey: I object to this, your Honor.
The Court: The objection is sustained.
Mr. Keenan: All right.

Q. Tell us how you happened to get the uniform. Who mentioned it to you, if anyone, or how you happened to go and get it? A. Well, I mentioned it. I mentioned I needed a uniform. Summer was coming on and I had only one summer uniform that fitted at the time, and there was in fact several of us that were talking about uniforms. We all were. I mean nearly everybody around the office when the time came to go into a summer uniform.

Q. Yes. A. And Mr. Elias Bayer was present while we 1154
were talking about, and he suggested I. Buss. Well, I went down there and they said that they had never made an Army uniform before, and that they would take my order for it, and we talked about it, and they gave me a price on it, and I sent in and they made the uniform. And the first one they made didn't fit. I did not like it and I refused to accept it. And they made me another one and I accepted that uniform.

Q. As far as you were able to discern, they were not very skillful in at least their first try in making the uniform?

Mr. McGohey: I object to that, your Honor, as being immaterial and irrelevant to any issue here, what the capacity of the Buss firm was. 1155
The Court: Yes. I sustain the objection on that.

Q. Of course, Colonel, if you had thought that in any manner anyone was trying to influence you in any improper fashion, you would not have accepted it, would you?

Mr. McGohey: I object to that, your Honor.
The Court: Overruled.

Mr. McGohey: I submit that has been answered.
The Court: Overruled. Go ahead, Colonel.

A. I would in no way compromise myself. I mean it never occurred to me.

Q. You would have been angry if you thought anyone was doing that? A. I definitely would, yes, sir.

Q. And this letter of June 26, after reading that, you would have no doubt in your mind that your feeling towards the two Bayers was a very wholesome one, wasn't it? A. Well, right up until June, 1944, if I can bring this to mind, while I was at Mitchel Field, I learned while I was
1157 at the Mitchel Field Hospital or I had heard that Mr. Elias Bayer had become a father, and I had ordered a blanket, a baby blanket, and sent it down to him. I had not seen him but only once since then when he called me to have you talk to me this last year.

Q. All right. A. So that I have not had anything to say, or talk about to Mr. Bayer; in fact, actually I have not seen him since January 1—December, 1943.

Q. Now, you have referred to the fact that you saw me. On how many occasions did you see me? A. One occasion.

Q. And I went up there with Mr. Levy, the counsel? A. That is right.

Q. To talk to you? A. Yes.

Q. And I asked you about the matters pertaining to the Bayers and the charges made against them? A. Yes.
1158 Q. When was that, as you recall it, Major, or Colonel? A. I think it was in April or May of this year.

Q. Of this year? A. Yes.

Q. And I asked you what occurred between you and the Bayers, and you told me the story, is that correct? A. I did.

Q. And I just asked you to please tell me exactly what happened, and did I suggest to you anything——

Mr. McGohey: If your Honor please, I object to anything that Mr. Keenan told the witness.

Mr. Keenan: Oh, your Honor, I am not going——

The Court: He has not asked that yet.

Q. Did I suggest to you anything that your testimony should be in this case in any manner or fashion? A. No, sir.

Q. Did I tell you anything, or was I seeking information apparently from my questions? A. Well, I think you were seeking information. I mean there was no other reason for you to be there.

Q. I went out to your home, is that right? A. That is right. 1160

Q. Called you up and asked you if I might see you? A. That is right.

Q. And told you frankly, I told you that I was counsel for the Bayers? A. Yes.

Q. That they had been indicted, right? A. That is right.

Q. And some other indictment, not this, and that I wanted to get the story from you, is that right? A. That is right.

Q. And you told it to me? A. That is right.

Q. Did you ever hear any complaint about the conduct of these boys out there——

Mr. McGohey: I object to that—— 1161

Q. —at the camp?

The Court: Objection sustained.

Mr. Keenan: Exception.

May I have an offer to prove, your Honor, at this time, a very brief one?

The Court: Sir?

Mr. Keenan: May I have an offer to prove in the record?

The Court: All right. Come up, Mr. Stenographer.

(The following took place at the bench, not in the hearing of the jury:)

Mr. Keenan: I respectfully expect to prove if the witness were permitted to answer that these two soldiers were not the subject matter of any complaint at any time, and right from the beginning to the end conducted themselves as other boys and were treated in that fashion.

The Court: The question you asked was if he ever
1163 heard of any complaint.

Mr. Keenan: I expect the answer to be that he had not.

The Court: And I sustain the objection on the ground that you are asking for hearsay. I will permit you to ask him anything he knows of his own knowledge.

Mr. McGohey: And that I am going to object to as being immaterial and irrelevant to the issues.

The Court: I will overrule that.

(The following took place in the hearing of the jury:)

Q. I will ask you did you know of any complaints about the conduct of these boys?

1164

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. I knew of no complaint, no; there was no complaint.

Q. Now, just a question or two more, Colonel. When you received the call from New York from Elias Bayer and Samuel Bayer, can you fix the time of that as best

possible, the closest you can? A. My best recollection is it was in September.

Q. Of 1943? A. Of 1943.

Q. The boys then were at Westover? A. Yes.

Q. Or Bradley? A. Yes.

Q. And they were then transferred to the Airborne Engineers, is that correct? A. It is my understanding that they were medical troops attached to the Airborne Engineers.

Q. Medical troops attached to the Airborne Engineers? A. Yes.

Q. And that camp was some distance from New York City, or do you know where it was? A. Yes, it is. 1166

Q. About how far from New York City, roughly? A. Oh, 150, 175 miles, I should judge.

Q. What are you talking about now? Westover? A. Westover.

Q. Where is Bradley Field? A. It is north of Westover.

Q. What State is it in?

Mr. McGohey: I object to this, your Honor.

The Court: It is already in evidence. One is in Massachusetts and one is in Connecticut.

The Witness: Connecticut.

Mr. Keenan: Your Honor, I am awfully sorry, but I did not remember that. 1167

Q. By the way, Colonel, is there a file that is allotted to each enlisted man, a file 201? A. Each military person has a 201 file.

Q. And what is that? Will you tell us about it? A. The entire——

Mr. McGohey: I object to this, your Honor, as immaterial and irrelevant to any of the issues in the case.

The Court: I will permit the question.

A. (Continuing) The entire paper record of the man.

Q. That is an Army term. Very briefly, the entire paper record of the man means what? A. Well, it is the record of the service and all of the official communications concerning that particular person, military person.

Q. Including commendations if there are any? A. Commendations, disciplinary actions, transfers.

1169 Q. Disciplinary actions, transfers? A. Promotions.

Q. And gives the data concerning the same? A. About that man.

Q. Where does that file ordinarily stay? A. In the headquarters.

Q. Do you know where Martin Bayer is now? A. No, I don't.

Q. Well, where would that 201 file be with reference to him? Suppose he were in Burma but in the United States Army, where would the file 201 be of Martin Bayer? Would it be in Burma where he was, or would it be in Mitchel Field, or Washington? I am seeking information from you.

Mr. McGohey: If the witness knows.

1170

A. No, that is right. I have been away from things for two years, and my last—now, this is two years old, and my last recollection of it was that it stayed in the office, and only the file or the record which is the part that has left here now——

Q. Yes. A. —showing the consolidated happening to that person goes forward, but the individual sheets are kept, if I remember correctly, at the last station.

Q. Last station in the United States? A. Well, every time a transfer—well, the ordinary things that happen are left there. The consolidated files go forward. It makes it easier, as some of those things are less bulky. Take a man that has got a lot of things, good or bad, and he has a very long length of service, there is a 201 file, and you just don't pass all those papers on, but you have a consolidated record and that will go on.

Q. I am seeking information from you to try to find out how to get hold of such a file of a man's experience and everything else.

Mr. McGohey: I move to strike that out. 1172

The Court: Well, he does not know. He does not know.

Q. I think we were talking about the approximate time when you got this telephone call from the Bayers, and I asked you where the boys were, and I think you said they were with the Airborne Engineers at Westover Field. A. Yes.

Q. What was the conversation you had with Samuel Bayer, briefly? A. Well, he was very much upset about the boys leaving, and that they were—that they were in an alerted outfit, and that they were due to go overseas, and was there anything that could be done to keep them from going over and to transfer them out.

Q. Did he state in his conversation how long they had 1173 been at Westover Field? A. Oh, no.

Q. Do you know whether they were there as a matter of days, or weeks, or months? A. No, I do not.

Q. That wasn't discussed? A. No.

Q. I believe you fixed the time as best you could as some time in September, is that right? A. Yes, sir.

Q. Of 1943? A. Yes, sir.

Q. Now, you told us, I believe, that Mr. Bayer was agitated, excited? A. Yes, sir.

Q. And you also told us something about Samuel Bayer fainting? A. Yes, sir.

Q. Did I so understand you? A. Yes, you did.

Q. How do you know that? A. Because the conversation broke abruptly, and Elias came on the phone, Elias came on the phone and said "Sam has fainted; Sam has collapsed." I don't know which word he used.

Q. Did you hear any noise, or commotion on the phone, or couldn't you? A. No, I couldn't. The conversation was cut.

1175 Q. It terminated suddenly, did it? A. Yes.

Q. Abruptly? A. Yes, it did.

Q. As though something like that might have happened? A. Oh, yes. He was very agitated; he was very excited.

Q. Was he, Colonel, at what you might call the breaking point just before he ended the conversation? A. I am not a judge of that.

Q. Well, I realize that, but I would like to have you give the best and honest opinion. A. He was very agitated. I had known him as a sickly man.

Q. Who? A. Mr. Sam Bayer.

Q. An excitable person? A. Well, I wouldn't say excitable, no.

Q. Sickly? A. Yes.

1176 Mr. McGohey: I can't hear the witness.

Q. When you told him that you could not do anything about it, were you offered any inducement at that time, such as if you could do it they would make it worth your while, or something of that nature? A. Oh, no, sir.

Q. Nothing of that nature at all? A. No, sir.

Q. Had you ever received requests from other people with reference to transfers, or movements of troops, or soldiers?

Mr. McGohey: I object.

Q. (Continuing) Or can you tell us——

Mr. McGohey: Pardon me. I object, your Honor.

The Court: I sustain that objection.

Q. Is it a fact that it was more or less common that as you would meet the parents of different children in the Army, for them to ask you if they could be transferred 1178 from one outfit to the other?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection. You may answer.

A. I never met many of the parents. No, I never saw many of them.

Q. Your answer to the question, then, Colonel, is no, from your observation, is that right? A. That is right.

Q. That was a novel experience for you? A. That is right.

Q. But you are certain that nobody offered you any inducement of any kind at any time up to the present to do 1179 anything in your conduct other than to be conscientious and faithful in your duty?

The Court: You asked that question.

Mr. Keenan: I mean up to the present time.

The Court: You asked that question.

Mr. Keenan: Have I?

The Court: Yes.

1180 *Alfred H. Jacobson—For Government—Cross.*

Mr. Keenan: I do not care to be offensive. That is all.

The Court: Have you any questions?

Mr. Robb: Yes, I have a few.

Cross-examination by Mr. Robb.

Q. Colonel, just for the record, you have never seen me before, have you? A. No, I have not.

Q. You have not ever seen my associate over here either, have you, General Ansell? A. No, I haven't.

Q. Colonel, I wonder if you would help me get some dates straight. Is it your testimony that you met the Bayers
1181 first around about January of 1943? A. Yes.

Q. Am I right in that? A. That is right.

Q. And it was along in about April that you got these uniforms, am I correct in that? A. This is all to the best of my recollection.

Q. I understand that perfectly, Colonel. A. There has been a lot that has happened since.

Mr. Keenan: Your Honor, I have forgotten a very important question. I wonder if I might ask it now?

Mr. Robb: Go right ahead.

The Court: All right.

Mr. Keenan: Very important, and I apologize.

The Court: All right.

1182

By Mr. Keenan.

Q. Colonel Jacobson, did you have anything to do with the transfer of either one of these two boys from the Airborne Engineers to the Commando Unit? A. Oh, I know nothing about that, no.

Q. So that if anyone made the statement that it was done as a favor to you he is mistaken about it? A. Oh, yes. I did not know anything about this at all.

Mr. Keenan: That is all. I am sorry. Thank you.
The Court: All right, Mr. Robb.

By Mr. Robb.

Q. Now, Colonel, when did you first commence to go out and associate with the Bayers, or either of them? A. Right after I met them.

Q. Maybe a week or two afterwards? A. It was about a week after. I think in fact it was the next fight, the next Friday night.

Q. Did you used to make it a practice to go to the fights with them every Friday night? A. I had practically before I knew them. 1184

Q. After you met them you would go along as their guest, Colonel? A. That is right.

Q. And were there other officers who were with you on those occasions? A. Yes, there was.

Q. Colonel Vidal? A. That is right.

Q. And Captain Roeser? A. That is right.

Q. He was then Captain? A. No, he was Lieutenant.

Q. Lieutenant? A. Lieutenant.

Q. Now, Colonel, how long after you first made the acquaintance of the Bayers was it that you first saw the defendant Major Radovich, with the Bayers? What I am getting at is how long after you met them was it that you met him with them? A. Oh, I don't know. I would say it was some time—I only saw him with them once. 1185

Q. When was that, Colonel? A. At Mr. Elias Bayer's birthday party. Major Radovich had Mrs. Radovich and I had Mrs. Jacobson, and we were all there.

Q. Will you give us the approximate date of that? A. Well, I don't remember it, really I don't.

Q. Some time after you had met them? A. Oh, yes, it was.

Q. Colonel, getting back— A. Whenever his birthday was, some great length of time. I would say just now some time between there in June and January, and it was about the middle of that time, we will say, somewhere along there.

Q. Now, Colonel, getting back to my question, it was some time after you met them that you met him, is that right, that you met Major Radovich? A. That is right.

Q. Could you try and fix that time when he met them with respect to their transfer into the Headquarters Squaddon that you told us about? A. I don't clearly understand the question.

Q. Well, Colonel, you told us these boys were transferred, the Bayer and the Usdan boys were transferred into the 1187
Headquarters Squadron; do you remember that? A. That is right.

Q. Now, isn't it true, Colonel, that it was not until after that had taken place that the Bayers even met Major Radovich? A. Oh, yes, that is right.

Q. That is correct, isn't it? A. That is correct; that is correct.

Q. In other words, at the time that transfer took place. Major Radovich did not even know the Bayers? A. To my knowledge, no.

Q. And he did not have anything to do with that transfer? A. Oh, no, no.

Q. As a matter of fact, Colonel, that transfer was arranged, was it not, by Colonel Vidal? A. Well, by Colonel 1188
Vidal and myself.

Q. I see. Will you tell us about that, Colonel. A. Yes, surely. I came into the office one morning and Colonel Vidal told me that one of the Bayer brothers had called him to tell him that the two privates there were being transferred to a pool due to the fact that the WACs were coming in to take over the clerical duties in the Base Headquarters, and that was—they were the first ones to receive the WAC contingent. At that time—I got to trace this

back and give some background to it. At that time we were then expanding——

Q. By "we" you mean what? A. The Fighter Command.

Q. Yes? A. Was expanding.

Q. Yes, sir. A. We were growing bigger all the time, and we were very shy of clerical help from officers right down to privates, and, in fact, we had established quite a liaison with Camp Upton through our personnel section to obtain draftees that were qualified for these various jobs. Our personnel officer, known as the A1 Command, spent a great deal of time out there establishing this contact, and he proselyted for this clerical help.

Well, knowing this at this time of the case even our little 1190
office there, the operations setup, was expanding. Now, these two men became available——

Q. By "these two men" you mean the Bayer boy and the Usdan boy? A. The Bayer boy and the Usdan boy. He said, "Let us get them."

Q. Who said that, Vidal? A. Yes. He said, "Let us get them and any others that are there."

Q. "Get them and any others that are there"? A. Yes, "that are there," and he turned to me and he said, "You call Boebel."

Q. Colonel Vidal said that? A. He is probably a Colonel now. He was my Squadron Adjutant first, and then when I went up to Base Headquarters I brought him up as an assistant, and when I left there to go to the Fighter Command he became Base Adjutant. 1191

"You call Dick Boebel and see whether you can get—whether or not you can get him."

I called Dick Boebel—this is Captain Boebel, and I asked him whether these men were available for—whether they were available for transfer, and what their status was.

He said that they were to be transferred soon into a pool; that they were moving them all out, and that they had been ordered to send them into a pool. I do not know whether

the pool was down there, or a pool some place out of Mitchel Field, some of our fields down there, or whether they were being sent into a pool for reassignment.

And then he said "Ask him whether they were available." "Yes. Let me check with him personally and find out how the TO was."

Q. How the what was? A. The TO, Total Organization. And Colonel Vidal reached over, hit the teletalk, which is the intercommunication system, and asked personally whether there was space and, of course, they said yes, there is a great deal. He said, "We are getting two men from Base Headquarters and was it O.K.," because finally they
1193 have to approve all transfers.

Q. Yes? A. Personally nobody has to accept it in their department. They run it. They run it. That was about 10 or 10.30, and at 12 o'clock they had reported for duty.

Q. Now, Mr. McGohey asked you when he asked you about that transfer who was in command of the organization to which they finally went when they made that transfer, and you replied either a man named Jones, or then Captain Radovich. Now, Colonel, you did not mean that Captain Radovich had anything in the world to do with getting those men transferred, did you? A. Oh, no.

Q. Because he had not? A. No, he had nothing to do with that. As I say, I did not know him very well at that time, frankly.

Q. It just happened that he happened to be in command
1194 of the organization where they landed, isn't that it? A. That is right.

Q. Now, Colonel, I suppose you made a great many statements about this case to various investigators, investigating officers, or one thing or another, haven't you? A. Not a great many, no.

Q. You made several? A. Yes.

Q. Interviewed by some Army officers out at Mitchel Field? A. Yes.

Q. And you told them about knowing the Bayers, receiving these tires, and so on? A. Yes.

Q. And I suppose you were interviewed by the F.B.I.? A. Yes.

Q. And you also talked to Mr. McGohey? A. Yes.

Q. When did you talk to him, sir? A. Yesterday for the first time.

Q. Is that the first time? A. Yes.

Q. And, of course, you told them this story that you have told us? A. Yes.

Q. You have not been charged, or indicted, or anything, have you? A. No, I haven't.

Q. Now, Colonel, let us get down to the conversation, or 1196
your talk in the hospital with the defendant Major Radovich. That took place when? A. Well, right after he had been released from the hospital.

Q. Yes. A. Now, what the date was I am not—it was some time in September I should say.

Q. In that conversation he told you where he had been held in the hospital? A. No, I knew where he had been held because his nurse was at two wards.

Q. You talked about that with him, didn't you, sir? A. What?

Q. Wasn't there some conversation about him being held in the so-called "Nut Ward" in the hospital? A. Oh, I knew he was there, but I don't remember any conversation.

Q. You knew he was there? A. Yes. 1197

Q. In the psychopathic ward, or nut ward as they call it? A. Well, I don't know what they call it; it was the psychopathic ward.

Q. You were not in the nut ward, were you, Colonel? A. No.

Q. By the way, what ward were you in? A. I was in the medical section.

Q. Were you in bed when this talk took place? A. Yes.

Q. How long would you say your talk took? A. About ten minutes maybe.

Q. He just dropped in to see how you were? A. That is right.

Q. And I believe you said you asked him how he got mixed up with the Bayers? A. Something like that. There was something—I mean the exact words I don't remember.

Q. You would not pretend to say the exact words? A. No, the sum and substance is all I can think of.

Q. He did not tell you, Colonel, or you did not want to give the jury the idea that he did tell you that he had received any money, did you? He did not tell you that?

1199 A. Oh, yes, yes.

Q. He told you that there? A. Yes, he did, yes.

Q. Are you sure about that? A. Definitely, yes, sir, yes, sir.

Q. Now, Colonel, when did you first make any report of that conversation to anybody?

Mr. McGohey: I object to that, your Honor. That question was just asked. It is not material or relevant.

The Court: I think it is proper. I overrule the objection. Go ahead.

Mr. Keenan: May I ask your Honor that that last answer be stricken out in reference to my two clients, the Bayers, as having been made in their absence?

The Court: Yes. You will consider that, ladies and

1200 gentlemen, in your consideration of the case against the defendant Radovich, but not in your consideration of the case against the Bayers. Consider it for what value you conclude it has in your consideration of the case of the person who made the statement; that is, Radovich. All right, go ahead.

Mr. Robb: Would you read the question back to the Colonel, please.

Q. (Read.) A. It was shortly after that that I was questioned. There was a visit by the FBI agents, and they questioned me on this visit and asked me who I talked to in the case as I remember it, and what was said, and after that——

Q. Did you make a written statement? A. No.

Q. Which agent was it? A. I think it was—so many I have seen——

Q. Mr. Flynn? A. It may have been. I am not certain about that. It may have been Mr. Flynn.

Q. Did you tell him about that conversation? A. I am not certain. They were questioning me.

Q. Did you tell him about that conversation? A. Well, 1202
I don't know; I don't remember.

Q. You don't know? A. I don't remember. I told one of the FBI agents.

Q. When do you remember telling anybody about that conversation? A. At that time, right after that.

Q. Right after that? A. That is right.

Q. Did you tell Mr. Keenan about it when you talked to him? A. Did I tell Mr. Keenan about it?

Q. Yes. A. Oh, yes.

Q. You are sure about that? A. Yes.

Q. Positive? A. Yes.

Q. Told him all about it? A. Oh, yes.

Q. Now, on the occasion of that conversation, Major Radovich came there as your friend, did he not? A. Oh, yes. 1203

Q. And that was intended, of course, to be a friendly conversation? A. Yes and no. I don't know what it was. It was just talk.

Q. Had you asked him to come to see you? A. No.

Q. Had you sent any word to him by any nurse that you were there? A. No, no.

Q. Had you talked to the FBI before you had that conversation with him? A. Yes, several times.

Q. Pardon? A. A number of times.

Q. A number of times? A. Yes.

Q. Do you know why they came back to see you again after the conversation? A. No.

Q. You had not sent for them? A. No.

Q. You are sure? A. I don't—no, I don't—no, they were coming in there. They came in on a number of occasions.

Q. How many days after——

Mr. Keenan: Keep your voice up. I do not hear the witness, please.

A. They came in a number of occasions.

1205 Q. How many days after you had that conversation did you talk with the FBI men? A. Oh, a number of days.

Q. Can you give us an approximation? A. A number of times.

Q. Did you ever make a written statement to the FBI? A. Yes, on their first visit.

Q. Their first visit? A. That is right.

Q. Before that conversation? A. That is right.

Q. Is it your testimony that that particular conversation was never put in any written statement that you made? A. No.

Q. Is that right? A. That is right.

Q. You were never asked to make any signed statement to that effect? A. No.

1206 Q. Is that right? A. Yes.

Q. How long after that conversation did you see the FBI agents? A. I don't know. A week or so, maybe; I don't remember.

Q. A week or so? A. I mean, I am just hitting and missing there now when it comes to that time. It was two years ago, or about a year ago.

Q. Pardon me? A. About a year ago.

Q. Are you through? A. Yes.

Q. They had not asked you to see if you could pump the defendant Radovich, had they? A. Oh, no.

Q. You are sure about that? A. Definitely.

Q. By the way, you had played some cards with the Bayers, hadn't you? A. I had what?

Q. Played some cards with the Bayers? A. Yes.

Q. Win any money? A. On one occasion.

Q. Did you win any money? A. No.

Q. Are you sure about that? A. Definitely. We played gin rummy one afternoon, Elias and I, one Saturday afternoon, I believe it was, or Friday afternoon, before a fight.

Q. Never won any money from them at all? A. Never won any money. 1208

Q. Couldn't be mistaken? A. Not mistaken in the least.

Q. Do you recall making a statement to Colonel Snyder over at Mitchel Field? A. Yes, I do.

Q. In August, 1944? A. Yes.

Q. Do you think you would know a copy of it if you saw it, Colonel? I mean, look at this and tell me if that is a copy of the statement you made to Colonel Snyder (handing to witness). You do not need to read the whole statement. I wonder if you can just look at it and tell me. I mean, I do not mind if you want to read it all. A. No, I have no faith in Colonel Snyder. Now, let us have that set straight right here.

Q. Oh, you have no faith in Colonel Snyder? A. No. 1209

The Court: We are not interested in Colonel Snyder. You were asked the question as to whether that was your statement or not.

Mr. Robb: Yes.

The Witness: I don't know. I have never seen it before.

Q. Well, would you like to look at it some more, Colonel? I am sorry, I did not mean to take it away from you (hand-

ing to witness). Now, Colonel, could you say whether the document I have just shown you is a copy of the statement you made to Colonel Snyder? A. It could be. As I say, I have never seen the statement before. I have never seen the statement before. From remarks that I have heard——

The Court: No, we do not want any comment. Do you recognize the statement?

Q. Colonel Snyder was the investigating officer in the case? A. That is right.

Q. And you did in fact make a statement to him, is that
1211 right? A. That is right.

Q. Now, Colonel, did he not ask you this question and did you not make this answer: "Q. Did they offer any money"—"they" meaning the Bayers—"or give you any money for any purpose whatsoever? A. The only money I got from him was money I won playing in a card game. Q. Was that a large amount? A. No. That was fifteen or twenty dollars." Do you recall those questions and answers? A. No, I don't. It could be. I mean I don't recall it. I don't recall it.

Q. Now by "could be" you mean you could have made that answer to that question? A. I could have made that answer, yes.

Q. And if you did your testimony about not ever winning
1212 any money from the Bayers is not correct; that is right? A. That is right, sir, but subject to refreshing my memory there.

Q. Your testimony, I take it, is that you are not very clear about what you did tell Colonel Snyder, is that right?

Mr. McGohey: I object to that. He has not said that, your Honor.

Mr. Robb: I am asking him if that is his testimony.

The Court: Ask the question as to whether it is or not.

Q. Is it your testimony that you are very clear about what you did tell Colonel Snyder? A. It was a year ago, and I was in great pain at the time and under a very serious treatment.

Q. Yes. A. And I had—it was—I am not very clear about any of the questions there.

Q. Now, how long ago was it that you had this conversation with Radovich that you tell us about? A. Well, that was in—let me see, September. 1214

Q. That was over a year ago, wasn't it? A. That is right.

Q. And you were in pain, too, then, weren't you? A. Not as bad. I was taking penicillin treatment at that time.

Q. Pardon me? A. At the time that Snyder came in there I was taking penicillin treatments every three hours. They are very painful and very upsetting.

Q. At the time Snyder talked to you, you knew, didn't you, that you were also under investigation in this case? A. No, I didn't know it.

Q. You didn't know that? A. No.

Q. Didn't suspect that? A. I knew nothing about it.

Mr. McGohey: I suggest, your Honor, there is no evidence at all up to now that this man was ever under 1215 investigation in this case.

Mr. Robb: I am asking him.

The Court: All right. He asked him and he said he knew nothing about any investigation. There is no evidence that he was.

Q. By the way, Colonel, you have mentioned a Lieutenant Roeser. What was his duty? A. He was the head of the Radar fortification.

Q. Under you? A. Under Colonel Vidal.

Q. And you were under Colonel Vidal, is that right? A. That is right.

Q. You had Roeser transferred there, didn't you? A. That is right.

Q. How long before 1943 was that? A. Oh, that was the latter part of 1942, I believe.

Q. He was an old friend of yours, wasn't he? A. We were brought up together.

Q. There was not anything wrong about your having him transferred there, was there? A. Not at all. He was available for transfer to any unit in the Army.

1217 Q. Yes, sir. Colonel, the Bayers you found out are pretty well known in New York, is that right?

Mr. McGohey: I object to this, your Honor, certainly immaterial.

The Court: I sustain the objection.

Q. Did you have any conversation with the defendant Radovich about the Bayers being well known in New York? A. No.

Q. Did he tell you in this talk you had with him that he thought they were able to help his wife and daughter, and little baby? A. No.

Q. Did he tell you that they might be able to give him a job after the war? A. No.

1218 Q. Or take care of his wife and daughter if anything happened to him? A. No.

Q. Nothing like that? A. No.

Q. You knew that he had received a gift of a uniform, or something from the Bayers? A. Vaguely, yes. I did not know that he accepted it or not. There was one of them that turned it back. Now whether it was him or not——

Q. I was not speaking very accurately when I said that, Colonel. You knew that there had been some talk about his getting a uniform? A. Yes.

Q. You afterwards heard that he turned it back, isn't that right? A. Pardon?

Q. You afterwards heard he turned it back? A. There is something about that. I am not sure on that.

Q. Yes. And did he tell you about the Bayers making a present to his little baby? A. No.

Q. Never heard about that? A. No.

Q. Did he tell you about the Bayers making presents to his wife of some lingerie or dress? A. No.

Q. Or something? A. No.

Q. Never heard about that? A. No.

Q. Would you say he did not tell you that? A. No, he did not tell me that, no. 1220

Mr. Robb: Will your Honor indulge me a moment?

The Court: Yes, sir.

Q. By the way, Colonel, do you still have these tires on your car? A. No, I don't have the car or the tires.

Q. How many times did you talk to Colonel Snyder? A. Once to my recollection.

Q. What did you mean when you said you had no confidence in him?

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained.

Have you some questions on redirect?

Mr. McGohey: No, I have no further questions on redirect. 1221

Mr. Robb: If your Honor please, one question that I overlooked.

The Court: All right.

By Mr. Robb.

Q. Colonel, did you ask the nurse either in your ward or in the nut ward where they had Major Radovich, to ask

1222 him to come in to see you? A. No. The way I found out about him being there was through the nurse.

Q. Through the nurse? A. She said there was some chap down there being held. There was quite a story around the hospital, and she told me who it was, and I said, "Well, I know him, and I know him well."

Q. You said that? A. Yes, and the rest of it would be supposition as to how he found out.

Mr. Robb: All right.

The Court: All right. You may be excused.

1223 (Witness excused.)

The Court: We will take a short recess until 3.25 P. M.

(Short recess.)

GERALD J. FLYNN, resumed the stand and testified further as follows:

Mr. McGohey: May I proceed, your Honor?

The Court: You may.

Direct examination continued by Mr. McGohey.

1224 Q. Now, Agent, when we concluded yesterday afternoon I think you had told us that you had been present in Mr. Wallace's office——

The Court: Friday.

Mr. McGohey: Sir?

The Court: Friday.

Mr. McGohey: Friday, yes, your Honor.

Q. —and that there was also there Samuel Bayer, Mr. Wallace, yourself, Agent Brown, Mr. Keenan, and Mr. Levy, and that some time during the conference I came in. Now, will you please tell us what you heard Mr. Bayer say?

Mr. Robb: If the Court please, will you instruct the jury at this time that the conversation or statement must not be used against the defendant Radovich for any purpose whatever?

The Court: Very well. Ladies and gentlemen of the jury: The witness has been asked to testify as to a statement made by the defendant Samuel Bayer upon a certain occasion, the exact date of which I do not recall. Have you fixed the date? 1226

Mr. McGohey: I think the witness fixed it as September 7, your Honor.

The Witness: February 7.

Mr. McGohey: I beg your pardon. February 7 of 1945.

The Court: All right. Now, ladies and gentlemen, under the circumstances in considering this conversation or conference, that is, inasmuch as it does not appear that these statements were made pursuant to the object of any conspiracy, and also that it would appear that they were not made during the continuance of any alleged conspiracy, I charge you that you may consider it evidence in your consideration of the charge against 1227 the defendant Samuel Bayer for the reason that this witness proposes to testify that the statements were made by the defendant Samuel Bayer, and in your consideration of the charge against the defendant Samuel Bayer you may consider any statements which this witness will testify were made by the defendant Samuel Bayer, but you should not consider any testimony as to statements made by Samuel Bayer in your con-

sideration of the charge against the other two defendants in the case.

Mr. Keenan: May I have an exception to your Honor's ruling?

The Court: Yes. You may proceed.

A. I entered the room shortly after the interview had commenced.

About the time that I entered Samuel Bayer was saying that his son Martin had been at Mitchel Field about three or four months, and at that time he was introduced to a Colonel Vidal and a then Lieutenant Roeser by his brother
1229 Elias. He later met a Colonel Jacobson, Lieutenant-Colonel Jacobson, and was introduced to him by Roeser. He gave his approval for these officers to go up to the I. Buss Uniform Company to obtain uniforms. I believe he stated that he was under the impression that Elias Bayer went up to that company with these officers.

He stated that during the conversation which he had with Colonel Jacobson he told Colonel Jacobson that his son, Martin Bayer, and his nephew Melvin Usdan, were stationed at Mitchel Field, and that they were clerks. He stated that Jacobson said that, "Well, we need clerks in our outfit, and I am going to have them transferred to my outfit."

Shortly thereafter he was introduced also by Roeser to Captain Radovich. I believe that he stated that his intro-
1230 duction to Captain Radovich came after the boys were transferred from the Base Command to the Fighter Command.

He got to know Captain Radovich rather well, and approximately two months after he had met Radovich, Radovich called him up and asked to come in and see him.

He came in and he told Sam Bayer that his company was being broken up at Mitchel Field, and that he would have to transfer the boys to Westover and to Bradley Field for overseas duty.

I think at that point he first said the State of Maine, and then he said it was Westover and Bradley Fields.

Sam Bayer stated that he asked Radovich if the boys could not remain at Mitchel Field and Radovich told him no.

He stated that the following day Radovich came into his office and told him that he had thought up an angle that he could have the boys transferred to the Medical Unit at Mitchel Field. Sam Bayer stated that he was very happy, and that he thanked Radovich, and that then Radovich asked him to speak to him alone, and when they were alone Radovich said, "I need $500. I have to send my wife back to Los Angeles."

1232

Sam Bayer told him to come in the following day and he would try to get it for him.

Well, the following day Radovich came into the office and Sam Bayer states that he gave him $400. He later changed that in his statement I think to $450.

A short time thereafter Radovich came in again and spoke to him, and told him that the transfers were going through. He then again spoke to Sam Bayer alone and told him that he needed another $500. Sam stated that he told him that he would try and get it for him, and to come back at a later date.

A short time thereafter, possibly a week, I don't recall exactly, Sam stated that Radovich came in again, and told him that the transfers had fallen through. He then told Sam Bayer that he knew who had disrupted the transfers, and that if he were given a thousand dollars he would be able to see that the transfers were effected.

1233

Sam Bayer stated that he told Radovich to come back in a few days and that he would get the money for him.

He then met Radovich in front of the Radio City Theatre, spoke to him, and he stated that it was in Radovich's car that he gave Radovich $500.

A few days later he met Radovich in Radovich's room at the St. Moritz Hotel where he gave him $400.

A short time thereafter he gave Radovich $600 in his office at 30 West 21st Street.

Now, the transfers were effected and the boys went to the Medical Unit at Mitchel Field, but stayed there only a few days when they were suddenly transferred to Westover and Bradley Fields.

Sam stated that Radovich then contacted him and told him that for $1500 he could have the boys transferred back to Mitchel Field, but that he declined the offer.

He didn't see Radovich after that for approximately
1235 three weeks or so, at which time Radovich flew in from Washington, and they dined at the McAlpin Hotel.

About a month or so thereafter Radovich telephoned Sam Bayer's office and made an appointment to see Miss Solomon and Sam Bayer at Cavanagh's Restaurant.

When he arrived he told Sam Bayer that he was being sent out on a dangerous mission to Burma, and that he had requested that the two boys come with him.

Sam stated that he pleaded with Radovich to leave the two boys at home, but that Radovich refused and told him that he would have to pay $5,000 if he wanted the boys transferred out of this unit, and that he had to make up his mind quickly.

I believe it was the following day that Mr. Bayer stated
1236 that Radovich came into his office, and he again pleaded with Radovich but to no avail. Radovich told him the money would have to be at Goldsboro, North Carolina, at a certain time, or the boys would go overseas. That conversation I believe he fixed as some time during November of 1943.

Sam Bayer stated that he gave the money to Elias Bayer and to a third party whose identity he refused to disclose, and that he was told by Elias Bayer that the money was paid to Radovich at Goldsboro, North Carolina.

In addition to that he stated that he never telephoned Colonel Jacobson; he never asked Harold Busch to change the records of the I. Buss Uniform Company.

He stated that he had paid for the uniforms of the officers whom he had sent to the I. Buss Uniform Company, but that he had never asked any of these officers to pay for those uniforms.

I believe that is my recollection of his statement without reading the transcript to refresh it.

Q. Did he say anything about any gifts that he had given to anybody? A. Yes. He had stated that he had given Radovich a bag, and that he had also let Radovich have a set of golf clubs.

1238

Q. Anything else that you recall? A. I believe he stated that the Plymouth Thread Company also paid for some monogram work which was done for Radovich at the Trousseau Monogram Company.

Q. Did he say whether or not he had ever reported any of his conversations with Radovich to anybody? A. I don't recall that he said that.

Mr. McGohey: Will your Honor excuse me for just a moment, please?

The Court: Yes, sir.

Q. Now, Agent, on that same day were you present in Mr. Wallace's room when Elias Bayer was present and made some statements? A. Yes, sir.

1239

Q. And can you tell us who was present at that time? A. You were present, Mr. Keenan, Mr. Levy, Special Agent Brown, a stenographer and myself.

Q. Was Mr. Keenan there? A. Yes, sir.

Q. Was Mr. Levy there? A. Yes, sir.

Q. Now, when was that day with respect to the statement that Mr. Samuel Bayer had made? A. Elias made his statement subsequent to the statement made by Samuel Bayer.

Q. Now will you tell us as nearly as you can what Elias Bayer said on that occasion?

The Court: Ladies and gentlemen of the jury: I repeat, as applicable to a different situation, what I said to you before; that is to say, the witness is now about to testify about certain statements made in his presence by the defendant Elias Bayer. You may consider this evidence in your consideration of the charge against the defendant Elias Bayer, but I charge you that you must not and cannot consider this evidence in relation to your consideration of the charges against
1241 the other two defendants in the case, Samuel Bayer and Radovich.

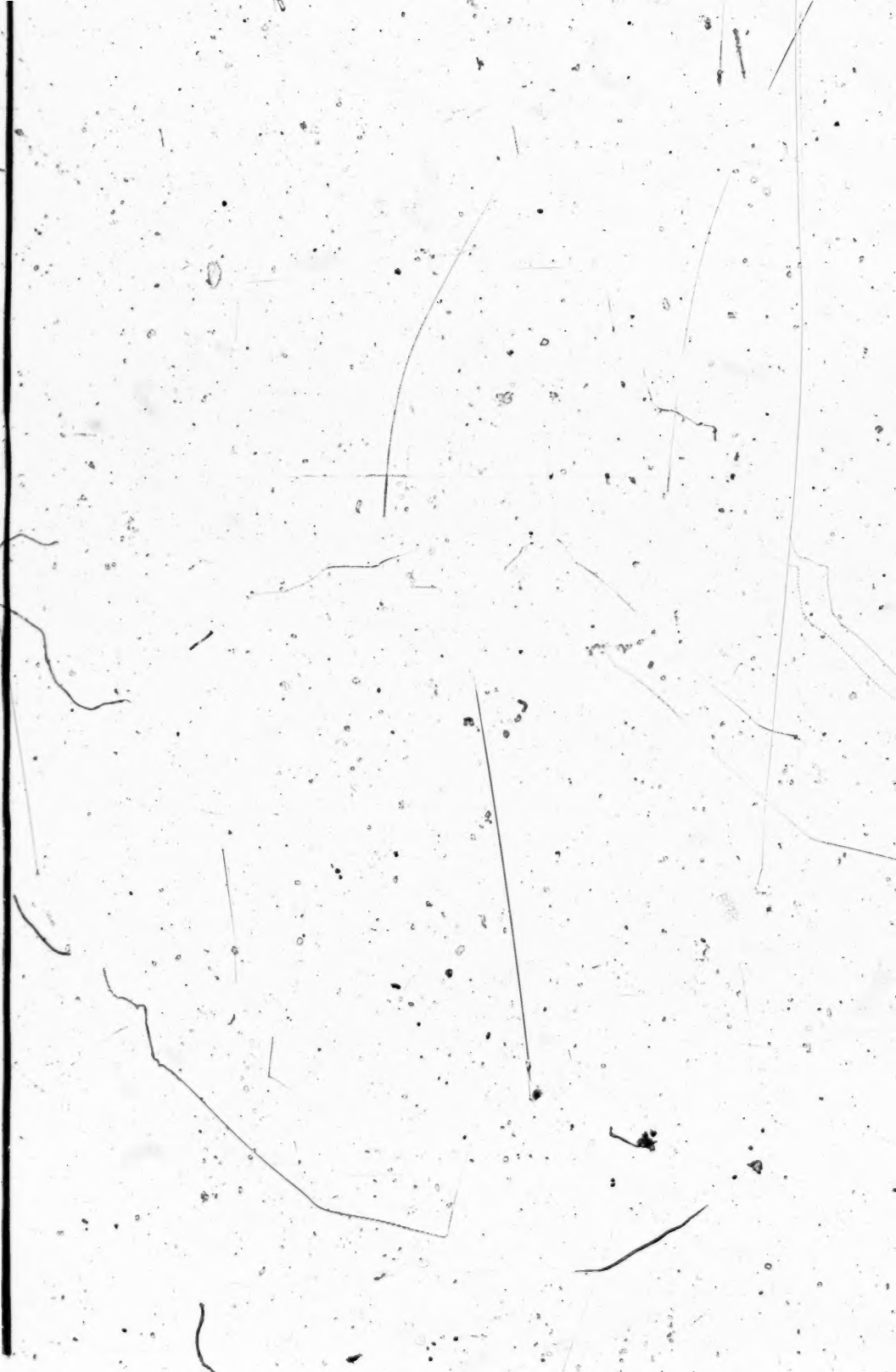
Mr. Keenan: Your Honor, I object to that instruction to the jury at this time on the ground that this testimony is coming several months after the occurrences alleged from the same agent that had to do with much of the same subject matter, and it is imposing an extra task upon this jury to ask them to consider what part of the testimony is coming in as alleged from what witness, and what came from another, and that it is prejudicial to the interests of both Bayers to have such confusion of recitation and for such reason I object, your Honor.

The Court: The objection is overruled.

Mr. Keenan: Exception.

1242 The Court: Proceed.

Q. Will you proceed to tell us what Elias Bayer said on that occasion? A. Elias Bayer stated that in the early part of 1943 he was at the Copacabana Night Club with a friend of his, whom I believe was Martin Goldstein, and that while there he met Colonel Vidal and Roeser. I believe Roeser was a Lieutenant at that time, and they were at the bar.



subsequently became dissatisfied with his uniforms and refused to take them. He asked Elias Bayer if the latter could take him to a better tailor. Elias stated that he took him to his own tailor, and that he told Radovich he did not know whether the price would be wholesale.

He also stated that during the summer of 1943 he was in Sam Bayer's office when Captain Radovich came in and told him that the boys would have to be transferred to another outfit for overseas duty inasmuch as Captain Radovich's outfit was breaking up.

He stated that he was in—that he was present when Radovich turned to Sam Bayer and said, "I would like to
1247 see you alone," and with him at the time was Miss Solomon who works in that office, and that he and Miss Solomon stepped out of the room and stood next to the door, that they heard Captain Radovich tell Samuel Bayer that he needed $500 to send his wife to California—send his wife home I believe he said.

He stated that he was present on the next meeting and also stepped out of the room with Miss Solomon and heard Captain Radovich tell Samuel Bayer that he needed $500 more.

The same situation took place when he stepped out of the room with Miss Solomon and heard Captain Radovich ask Samuel Bayer for a thousand dollars.

He said he was told by his brother, Samuel Bayer, that he had given Radovich some money.

1248 About November of 1943 he stated that he was present in the office of the Plymouth Thread Company when he heard Captain Radovich telling Samuel Bayer that he needed $5000 in order to have the boys transferred out of this unit which was scheduled for overseas duty in Burma; that he heard Captain Radovich say, "I am not getting all the money myself. I have to give one thousand five hundred dollars of this to one officer, or to one person." I don't

think he used the word "officer". "$2,000 to another person at the field, and all I have for myself is $1500."

I think he stated also that Captain Radovich told Samuel Bayer that if he had the money he wouldn't ask Samuel Bayer for the money.

Elias Bayer stated that he followed Captain Radovich down the stairs and asked him why he was doing this, why didn't he leave things alone, and that Captain Radovich told him that he couldn't help it; either the money had to be in Goldsboro by a certain time or it would be too late.

Elias Bayer stated that he went to Goldsboro in November of 1943 with an unnamed individual; that he arrived there about 4 A. M. in the morning; he pointed out Captain Radovich to this unnamed individual, and Captain Radovich and a third party went behind the station. 1250

Elias Bayer says that he was not present when the unnamed third party gave Captain Radovich the money.

He then took a cab to Raleigh, North Carolina, took a train from there to New York City.

He also stated that he had never telephoned Colonel Jacobson who stated that he had told Lieutenant Colonel Snyder——

Mr. Ansell: Pardon me. May I have that last statement read back?

The Court: Read it, please.

(Record read.)

The Court: Go right ahead. 1251

A. (Continuing) That he had told Lieutenant Colonel Snyder that he had—said he didn't know anything about these arrangements when questioned by that officer.

He stated that he had spoken to a Colonel Jones and that he had asked Colonel Jones if the latter could do anything to have the boys transferred.

He stated that he had talked to a Colonel Lipkin at the latter's home in Garden City, and that he had asked Colonel Lipkin the same questions, and that in the case of Colonel Jones, Colonel Jones said he would try but that he did nothing about it. He got the same reaction from Colonel Lipkin.

I believe that is my present recollection without the transcript.

Mr. McGohey: Will your Honor excuse me for just a moment?

The Court: Yes, sir.

1253 Q. Now, Agent, I direct your attention to the month of March of this year. Did you some time about the middle of the month of March of this year have a conversation with the defendant Radovich? A. Yes.

Q. And will you tell us where that conversation was held?

Mr. Keenan: If your Honor please, before we go into that I would like an opportunity to cross-examine this witness about his various discussions, what he heard from the Bayers, and, frankly, in this case you go on getting stories from one witness after another, or about one occurrence after another from this witness on the stand, and I will not be able to carry the

1254 thought in my mind to sufficiently examine him without a great deal of confusion.

Mr. McGohey: Your Honor, I have no objection to that if I may recall the witness and go into what he is about to testify to now concerning the defendant Radovich.

The Court: Do you wish to proceed with the cross-examination now?

Mr. Keenan: Yes, I do, your Honor, for the reasons stated.

The Court: All right.

Mr. McGohey: Then I may recall the witness for the other purpose later on?

The Court: Yes.

Mr. McGohey: Thank you, your Honor.

Mr. Ansell: If your Honor, please, I do not know what the fairest and most expeditious procedure may be, but it seems to me that the procedure upon these matters ought to be governed by the statements, or the particular statements to which the Government wishes to address themselves to, and then we will complete that and go to the next one that may be relevant.

Mr. Keenan: That is what I suggested generally 1256
on that.

Mr. McGohey: That is satisfactory to the Government.

Mr. Ansell: I thought it would be fairer to all of us.

The Court: That is all right. I think it is entirely fair.

Mr. Keenan: Your Honor, I may want, in the event that I am not apparently able to proceed sufficiently, to issue a subpoena to the United States Attorney, and ask him to produce in court the transcript of the testimony of Samuel and Elias Bayer for examination.

The Court: All right. You may take any course you choose.

Mr. McGohey: I have copies of them here that I 1257
will give Mr. Keenan right now if he wishes them, your Honor.

The Court: All right.

Mr. Keenan: Well, I have asked for them before, Mr. McGohey, and they were refused.

Mr. McGohey: Your Honor, I ask that that be stricken out.

Mr. Keenan: Well, it is true.

The Court: I will strike it out.

Mr. McGohey: I ask your Honor to direct the jury to disregard that comment by Mr. Keenan.

The Court: Ladies and gentlemen, that comment has no bearing on the case.

Do you wish copies?

Mr. Keenan: Not at the moment. I will get to that later, your Honor, if I may. I understand I may have a copy of it when I call for it now?

Mr. McGohey: Yes.

Mr. Keenan: Thank you.

Mr. McGohey: Your Honor has the originals of
1259 those.

The Court: Suppose I turn them over to you.

Mr. McGohey: Yes, sir.

The Court: All right (handing to Mr. McGohey).

Mr. McGohey: May the record show now, your Honor, that I am offering to Mr. Keenan right now the statement made by Samuel Bayer of February 7, the complete transcript of that; in fact, the original transcript of it.

Mr. Keenan: Well, may the record show that you are offering me what purports to be that, and it never has been examined by me to determine whether we will agree with his statement or not.

The Court: I do not like that kind of argument.

Mr. McGohey: Your Honor, I submit that Mr.
1260 Keenan has asked if he could have a copy of the transcript. Now, on my honor as an officer of this court and as the United States Attorney I am stating to Mr. Keenan that I am complying with his request.

The Court: I do not think such matters which are not evidence in the case, gentlemen, should be discussed in the presence of the jury. If you wish to have such arguments I will excuse the jury.

Mr. McGohey: I agree with that, your Honor, but I suggest that I did not start it.

The Court: I will excuse the jury if you wish to raise any question, Mr. Keenan.

Mr. Keenan: I don't, your Honor, but I have matter handed to me, and I did not want to concede it is a transcript. I have never seen it before.

The Court: You are not asked to concede anything.

Mr. Keenan: I thought so.

Mr. McGohey: Might I suggest that the Government did not state that there was any concession on Mr. Keenan's part.

The Court: Are you ready? 1262

Mr. Keenan: Yes, I am ready, your Honor.

Cross-examination by Mr. Keenan.

Q. Mr. Flynn, where do you live? A. I live in Riverdale.

Q. And how long have you been an agent of the FBI, as we call it? A. Since November 10, 1941.

Q. How old are you? A. 34.

Q. Now, you are a lawyer by profession? A. Yes, sir.

Q. And you have been admitted to the bar from the State of New York? A. Yes, sir.

Q. And have practiced law in the courts? A. To a modest degree.

Q. Yes. And have you been devoting a good deal of time to this case over the last year? A. I have devoted a 1263
substantial amount of time to the case.

Q. And you have interviewed witnesses, including Army officers and others, many of them several times, is that not true? A. That is true.

Q. And you gave your testimony in this case without referring to any notes whatsoever, is that correct, on the witness stand? A. I had no notes in my possession on the witness stand.

Q. Well, then, of course, if you didn't, you didn't refer to them then on the witness stand. A. Not while I was on the witness stand.

Q. Now, you knew, of course, when you testified that whatever statement was given by Samuel Bayer was taken in question and answer form, did you not? A. Yes, sir.

Q. And there were stenographers, young ladies, several of them, who wrote, who took down the transcript of the statement, is that right? A. Yes, sir.

Q. Perhaps as many as seven or eight of them? A. I wouldn't mention any numbers, because I don't recall how many there were there. I do agree with you, though, that
1265 there were reliefs on the statement.

Q. There were about six of them at least, were there not? I want to test your memory as with my own. A. I would say that that would be a reasonable estimate.

Q. You have told us when Elias Bayer was interrogated there was present, without reference to rank or seniority, Mr. Levy, Mr. McGohey and Mr. Wallace and myself; is that correct? A. That is partially correct.

Q. What is wrong about it? Was someone else there? A. You left out Special Agent Brown and myself, and the stenographer.

Q. You of course told us you were there. And Special Agent Brown was there; is that right? A. And Mr. McGohey.

Q. Well, I think I mentioned Mr. McGohey. A. Did you
1266 mention Mr. McGohey.

Q. Mr. McGohey was there? As a matter of fact, don't you know that Mr. McGohey wasn't there at all when Elias Bayer was interrogated? A. No. It is my present recollection that Mr. McGohey was there when Elias Bayer was interrogated.

Q. You feel reasonably certain on that point, do you? A. That is my present recollection.

Q. Well, I am asking you if you feel reasonably certain about your recollection. A. Yes.

Mr. Keenan: May I ask if this record (indicating) is supposed to show whether you were present or not, Mr. McGohey?

Mr. McGohey: I think so.

(Mr. Keenan conversed with Mr. McGohey out of the hearing of the reporter.)

Q. Mr. McGohey concedes that he was not there at all when Elias Bayer's testimony was taken, so that we won't waste time on that. Now, in view of that concession, Mr. McGohey, you will concede, would remember better than 1268 you would whether he was there or not, wouldn't he?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: I want to know, your Honor.

Mr. McGohey: The witness has answered his question. I don't think there is anything material or relevant about getting into a controversy.

Mr. Keenan: I object to the argument, your Honor.

The Court: I overrule the objection.

The Witness: Would you repeat your question?

Mr. Keenan: Suppose you read it.

(Question read.)

A. I will defer to Mr. McGohey's concession as to his 1269 presence there.

Q. All we are getting at, Mr. Flynn, is that even F.B.I. agents can be mistaken now and then, isn't that right? A. Absolutely.

Mr. McGohey: I object to that, your Honor.

The Court: Oh, it is immaterial.

Mr. McGohey: I object to the form of the observation, your Honor.

Q. Now in your recitation, and of course I have not been able to take down every word, because I don't write shorthand and I have not——

Mr. McGohey: I object to this, your Honor.

Q. And I have not been able to get every word; I have understood in substance that you draw a distinction between the testimony or the statements of Samuel and Elias Bayer in this particular: When you quoted what Samuel Bayer said about the first statement of Major Radovich with reference to the change that was taking place out at Mitchel Field eventually leading to transfer, you quoted
1271 Samuel Bayer as saying that Major Radovich told him that the men would have to be transferred out of that headquarters company, but when you quoted the statement of Elias Bayer you added the words, and I am not differentiating in the statement of Mr. Elias Bayer, that he quoted Major Radovich as saying that the boys would be transferred out to go overseas. Did you mean to make that distinction, because I tell you you did make it in your recitation? A. If I follow your question correctly, I didn't intend to make any definite distinction on the statement. It is my recollection that both of these men stated that the boys were being transferred to another outfit, and Bradley and Westover Fields were named for overseas duty.

Q. Now don't you know as a matter of fact, Mr. Flynn,
1272 that neither Samuel Bayer nor Elias Bayer at that time stated in substance that Major Radovich told them that these boys were to be transferred to either Westover or Bradley Field? A. No, I don't know that. I know that they did.

Q. You still say that your recollection is that both Samuel and Elias Bayer said that these boys would be—that Radovich had said that these boys would be transferred to

Westover Field? A. This is a different question. I am afraid I didn't follow that.

Q. I certainly don't want to be confused myself or to confuse you, Mr. Flynn. I want to go back. If I understood you correctly in your original answers to Mr. McGohey's questions, when you were first asked about what Samuel Bayer said—is that right? A. That is right.

Q. (Continuing) —when you got all through with that you were asked what Elias Bayer said; is that right? A. That is right.

Q. By the way, these two men, neither one of them was in the room when the other testified; that was true, wasn't it? A. That is true. 1274

Q. Their separation was requested by Mr. Wallace, isn't that right? A. I don't recall anything like that.

Q. Well, it was requested by Mr. Wallace or ? McGohey or yourself? A. I have no knowledge of that to my present recollection.

Mr. Robb: We can't hear the witness.

A. (Continued) I have no knowledge of that request; I don't recall the request being made in my presence.

Q. By the way, were you there at all when Samuel Bayer started to testify? A. I entered the room.

Q. When I say "there", excuse me. I mean in the room when Samuel Bayer was testifying. A. During the testimony that he gave? I was there. 1275

Q. Were you there when they first started to interrogate him? A. No.

Q. That is the question. And have you examined the record to see how many questions were asked and how many answers given before you got there? A. Yes.

Q. Could you approximate the number of questions and answers? A. Well, I would not approximate it, but if you show me the record I will show you the point that I recall coming in.

lection is that I said that—I would like to go back for a moment on your first statement——

Q. Before you do that, Mr. Flynn, and I am sure I want to give you all the fair opportunity to explain— A. Thank you.

Q. —but do you recognize it to be a fact that you did make a distinction in quoting what Sam Bayer said that Radovich told him and what Elias Bayer said about that very critical point of what Radovich said was going to happen to these boys? A. I don't recognize that I made the distinction.

Q. Now, if you did make a distinction in what you recall they said back in February, I believe it was, of this year, 1280
1945, you did not intend to make any distinction; is that correct? A. No, I don't think I consciously made a distinction there.

Q. So that if the record will show that you quote Samuel Bayer as having told a somewhat different story of what Radovich said when he first notified them that something was going to happen by way of transfer of the boys, that would have been a pure inadvertence on your part, wouldn't it? A. Well, it would have been substantial testimony of what I heard, to use your own words, in substance.

Q. No. But there would be a difference, wouldn't there, between telling Samuel Bayer that his boy was going to be transferred to another outfit and telling Samuel Bayer that his boy was going to be transferred forthwith or going to be transferred overseas; that would be different, wouldn't 1281
it? A. Well, I am not sure I understand your question. It depends upon the point of view I think that——

Q. I want to make my question very clear. A. The way I look at it——

Q. I am saying to you that there is a difference in your story, in your recitation of what Samuel Bayer and what Elias Bayer said, and I am calling your attention to the fact that you are a lawyer and you have worked with the

United States Attorney for a long time on this case, and that you undoubtedly are familiar with the indictment, and that the indictment charges that this was an effort to keep these boys from going overseas. Now, in view of that, I am asking you if you would concede it to be a substantial difference in the recitation whether Radovich used the words "transferred—period—out of my outfit" or "transferred overseas"? Wouldn't that make a very substantial difference, in your opinion?

Mr. McGohey: Your Honor, I object to all this line of questioning now as argumentative and beyond the proper realm of cross-examination.

1283 The Court: I overrule the objection to that question, without comment on the basis of your objection.

A. My present recollection is that both Samuel and Elias Bayer in making their statement in Mr. Wallace's office stated that Captain Radovich told them that his outfit was breaking up and that the boys would have to be transferred to other outfits for overseas.

Q. Now, that is what your present recollection is of what both of them stated in your presence, back, was it, in February, 1945, or March? A. That is right.

Q. February shall we call it? A. That was in February.

Q. Now you won't deny that you did make a distinction in the recitation you gave of these so-called admissions or

1284 statements of the two Bayers when you testified on that subject matter a few moments ago in answering Mr. McGohey, will you? A. Well, I would rather say that I am not conscious that I made any distinction.

Q. It is a pretty hard thing to remember just what you say yourself 15 or 20 minutes ago, isn't it, to get the reasonable accurate position of the words as they are related? A. Well, that depends upon the position that one finds themselves in when they make statements.

Q. Well, it is a hard thing to make statements when you have people pounding questions at you frequently, isn't it?

Mr. McGohey: I object to that, your Honor.

The Court: Well, I think I will sustain the objection, and call it a day.

We will take a recess now until tomorrow morning, after cautioning you not to discuss the case with anyone while you are on the stand.

Court stands adjourned until tomorrow morning at 10.30.

(Adjourned to October 10, 1945, at 10.30 A. M.)

1286

New York, October 10, 1945, 10:30 a. m.

Trial resumed.

GERALD J. FLYNN, resumed the stand.

Cross-examination continued by Mr. Keenan.

Q. Mr. Flynn, when you became associated with the Federal Bureau of Investigation, you were put through a period of training, were you not? A. Yes, sir.

Q. How to analyze evidence? A. Yes, sir.

Q. And how to present it? A. Yes, sir. 1287

Q. And of course you were instructed always to present the evidence in a fair and impartial manner? A. Yes, sir.

Q. Now have you discussed with the United States Attorney and his assistant, Mr. Wallace, or either of them, the testimony that you were to give on this stand? A. Very briefly.

Q. Well, didn't they go over the transcript of the record that they had and discuss the very part of it that ought to

be referred to in your testimony, with you? A. As a matter of fact, they did not. They asked me what I was going to testify to and I told them.

Q. Oh, you were the one that decided what you would testify to, is that it? A. I did not decide it. I told them what my recollection was, and what I intended to tell.

Q. I am not referring to that. I am not talking about your recollection at all. I am asking, in the preparation of this prosecution, realizing that you were to give testimony as to these so-called admissions or statements, if you didn't discuss with the United States Attorney or his assistant what part of the statements of these two men you
1289 would refer to on the witness stand?

Mr. McGohey: I object to that, your Honor, on the ground that the question has already been answered by the witness.

The Court: I overrule the objection. You may answer.

A. I believe I will have to answer that in the same way as I did answer it, and that is that I discussed the case with the United States Attorney and I told him what my recollection was and what I expected to testify to, and apparently it met with his approval.

Q. By the way, these statements were taken from Mr. Samuel Bayer and Mr. Elias Bayer in the absence of one
1290 another, is that correct? A. That is right.

Q. And that was by design, and not by inadvertence?

Mr. McGohey: I object to that, your Honor, as calling for the witness's conclusion.

Mr. Keenan: Is there any doubt about it, Mr. McGohey? Isn't it true?

Mr. McGohey: I object to that and ask that that be stricken out. The defendant's attorney has no right to question me here, your Honor.

Mr. Keenan: I will stand on my question.

The Court: I see nothing improper in the question. In other words, was it accidental or was it planned and designed for them to be questioned separately?

Mr. McGohey: If he knows.

The Court: If you know.

A. I can't answer that. All I know is the fact that each man made the statement alone, that is, that he was in the room, and not the other man, at the time that he made that statement.

Q. Now, how long did it take to get the statement in question and answer form from Samuel Bayer? A. You mean before the transcript was prepared or the actual statement? 1292

Q. The actual statement? A. Oh, I would estimate that it took about an hour and a half.

Q. Do you have any idea of how many pages of transcript it covered? A. Approximately seventy.

Q. And how about Elias Bayer, how long did it take for his testimony? A. I think it took much less; possibly an hour or a little bit short of an hour.

Q. Now to come back again to the first question I asked you, or the early question that I asked you this morning, I want to know if there was a discussion between you and either the United States Attorney or any of his assistants as to what part of the testimony of Elias Bayer you would refer to in your recitation on the witness stand, and what part would be omitted? A. There was a discussion as to 1293 what I would testify to, but not as to what I would omit. I don't recall any such discussion. There was none.

Q. All right. Now, did you know what the purpose was of Elias and Samuel Bayer being present in the United States Attorney's office when you were there, when you heard them answering these questions? A. Yes.

Q. You knew I was there; and you knew that I had been practicing law for a good many years? A. I did.

Q. And you knew what my position had been in the Department? A. Yes, sir.

Q. Did you talk over with the United States Attorney, his assistant Mr. Wallace, or Mr. McGohey, what this proceeding was and how it came about before you listened to this statement? A. I was told by Mr. Wallace——

Q. No. I have asked you if you talked it over, first, then we can find out what was said. A. Yes.

Q. What were you told by Mr. Wallace? A. I was told by Mr. Wallace that you were going to bring both of the Bayers into the office and that they were going to tell their part of the story.

1295 Q. Is that all he told you? A. That is all.

Q. You knew, of course, that their stories could not be brought from them without their permission, didn't you? A. Naturally.

Q. And you knew that I was not there for entertainment? A. Yes, sir.

Q. Was it not discussed with you that it was the claim of the two Bayers that this was not bribery upon their part but to the contrary it was money in a fashion extorted from them? Didn't you know that when you walked in there? A. I believe I was told that that was your contention.

Q. Now you say "I believe". Is there any doubt in your mind on that? A. No. I was told that that was your contention.

1296 Q. That is right. That was my contention. A. Yes, sir.

Q. And that was my belief. Was that statement made to you? A. I recall that it was your contention.

Q. But not that it was said to be my belief? A. I don't recall that it was said to be your belief.

Q. And you paid particular attention as to whether the word "contention" or "belief" was used? A. Well, I am giving my recollection, and if I recall that it was your contention, then I am doing my best to tell you exactly what I recall.

Q. All right. Now, after the statement was given, of course that was last February, and your appearance on the witness stand, you have discussed this matter with Mr. Wallace a great deal, haven't you? A. Not following my appearance on the witness stand. I had discussed it following the time that the statement was given.

Q. That is right. Well, that is what I intended to say and I think I did say. And after February, when you listened to this statement, and up to the time of your appearing on the witness stand, you discussed it many, many times with Mr. Wallace—haven't you? A. Yes.

Q. You were present in court during the time of the proceedings when other indictments were brought up? A. I 1298
was present on some of the occasions.

Q. And just when the matter came up as to whether the case was to be set for hearing or not, you were there, weren't you? A. Yes.

Q. And Mr. Brown was with you there most of the time, wasn't he? A. No, I don't believe Mr. Brown was there.

Q. But you were there? A. I was there.

Q. And you are really in charge of this case, the investigative features, for the Federal Bureau of Investigation, aren't tyou? A. The case is assigned to me.

Q. Well, that is a term. I mean you have the supervision over the investigation here, haven't you? A. No, my work is supervised by an agent who is specially assigned to supervise it.

Q. By the way, you were present also during the court- 1299
martial proceedings, were you not? A. No, sir.

Q. You were not? A. No, sir.

Q. You weren't there at all? A. I was there before the court-martial started and was excluded.

Q. But you were out there? A. Oh, I was on the ground, yes, sir.

Q. And that is out at Mitchel Field? A. Yes, sir.

Q. You were there? A. Yes, sir.

Q. That is what I meant to ask you. And you were excluded from the court-martial, were you? A. Yes, sir.

Q. Is that right? A. Yes, sir.

Q. By order of the court? A. On motion of defense counsel.

Q. What defense counsel? A. General Ansell.

Q. For defendant Radovich? A. Yes, sir.

Q. You knew, did you not, that one of the pertinent points in the case would be the question of the uniforms, and whether a request was made by the officers to the Bayers to get the uniform at a discount or otherwise, or whether there was an offer on the part of the Bayers to
1301 the officers to get these uniforms for them. You knew that, didn't you? A. I am not quite sure I understand your question.

Q. Well, I will make it very clear, or try to. If there is an issue in this case as to whether it was in the nature of extortion, or in the nature of corrupting officers or influencing their judgment, you as a trained lawyer with your criminal experience—I mean experience with criminals—would know that there would be a difference in this case with reference to the subject matter of these uniforms, as to whether or not——

Mr. McGohey: I am sorry if I interrupted you, Mr. Keenan.

1302 Q. —as to whether or not the officers asked the Bayers to get them uniforms at a discount, or whether the Bayers suggested in the first instance that they could get uniforms for the officers at a discount?

Mr. McGohey: I object to that, your Honor. I object to the form of the question, and I object to it as being argumentative.

The Court: That is a somewhat involved question, but the witness may answer it if he understands it.

A. Well, as I understand it, that calls for my opinion, and my opinion is that there probably would be a difference.

Q. Yes, and I have this purpose: you knew that at the time that you prepared yourself for this testimony, didn't you? A. Yes.

Q. And you did study this record before you testified in this case, didn't you? A. Yes.

Q. And how many hours would you say that you have put in studying this before you got on the witness stand cumulatively? A. Well, in the past several months I would say that I had read the record twice.

Q. Well, how many times all told have you read the record? A. That would cover approximately an hour or an hour and a half. 1304

Q. Well, how many times have you read the record all told? A. Twice.

Q. Just twice? A. Just the twice.

Q. Have you read some parts of it more than other parts and studied it for months in your mind?

Mr. McGohey: I object to that, your Honor.

A. No.

The Court: I will allow him to answer. He has already answered "No".

The Witness: No.

1305

Q. Now I am going to ask you this question, referring to the testimony of Elias Bayer, the substance of his testimony as you recall it; where did the first suggestion come from about uniforms? Did it come from the officers to Elias Bayer, or did it come from Elias Bayer to the officers? A. It came from the officers to Elias Bayer, according to my recollection of Elias Bayer's statement.

Q. Now, when you were examined on the witness stand by Mr. McGohey—

1306 *Gerald J. Flynn—For Government—Cross.*

Mr. McGohey: Page, please?

Mr. Keenan: Page 9fn.

Q. You were asked the question:

"Q. Will you proceed to tell us what Elias Bayer said on that occasion?" Perhaps I had better read the preceding question and answer, so that you will quite thoroughly understand it. Well, it has reference to page 7fn:

"Q. Now, Agent,"—you are now being inquired of by Mr. McGohey. The last question on page 7:

"Q. Now, Agent, on that same day were you present in Mr. Wallace's room when Elias Bayer was present and
1307 made some statements? A. Yes, sir."

Mr. Keenan: Now, on the next page 9fn, and before that, there is colloquy between counsel, you were asked this question:

"Q. Will you proceed to tell us what Elias Bayer said on that occasion?" Now, when that question was asked of you, you knew that it was a very important question in this lawsuit to be answered, didn't you? A. I knew that I was expected to give Elias Bayer's statement on that occasion to the best of my recollection.

Mr. Keenan: Now read the question to the witness again, please, and please answer the question that I
1308 have asked you, and not the one that you would like.

Mr. McGohey: I move to strike that out, if your Honor please.

Mr. Keenan: Repeat the question, please.

The Court: The jury will please disregard that comment, and counsel will not pursue that line.

Mr. Keenan: Please read the question to the witness again, Mr. Stenographer.

(Question and answer read.)

Q. Now will you please answer the question I asked you? A. Yes, I knew that that was an important statement.

Q. And your answer was as recorded by the reporter in this case: "A. Elias Bayer stated that in the early part of 1943 he was at the Copacabana night club with a friend of his, whom I believe was Martin Goldstein, and that while there he met Colonel Vidal and Roeser. I believe Roeser was a Lieutenant at that time, and they were at the bar. They indulged in some conversation and finally inquired into each other's background, and he told these two officers that he was in the thread business.

"Further conversation led to the fact that they sold thread to people who were making uniforms, and that 1310
Elias Bayer could probably get uniforms at a wholesale price for these officers."

Now you did not disclose in your answer where the initiative came from with reference to the question of getting uniforms, did you, in this answer? A. No. I can see that I did not.

Q. But clearly the answer given to the question by Elias Bayer was that he was asked by one of the two officers what his business was, isn't that true? A. That is true, and I might add further——

Q. That is all I have asked you for the moment.

The Court: He may complete his answer.

Mr. Keenan: I object to that. Just a moment, your Honor. I object to this witness volunteering a state- 1311
ment that is not called for by the question.

The Court: That objection is overruled. He may proceed.

Mr. Keenan: Exception.

The Court: He may explain or add to his answer.

The Witness: I may add that when I made that statement it was made according to my recollection, giving the pertinent facts of the statement made by

Elias Bayer, and the mere question as to who initiated that conversation at the time didn't appear to be important in the general summary of my recollection of the statement made by Elias Bayer.

Q. So, was that your own conclusion of what was important, or was that the conclusion that you arrived at after conference with Mr. Wallace and Mr. McGohey? A. No, that was my conclusion in giving the gist of the conversation which took place there. I was interested at the time in the pertinent portions of his statement.

Q. Yes. A. Which had to do with the fact that the money was paid and that the boys were transferred from an 1313 activated unit over to an unalerted unit, in order to keep them from going overseas.

Mr. Keenan: Now, if your Honor please, I ask that be stricken out, and I ask that this agent be instructed to no longer pursue those tactics on the witness stand. That is unfair.

The Court: I will sustain the objection and instruct the jury not to regard it, and the witness will please answer the question that was asked. All right, go ahead.

Q. Well, Agent Flynn, was it your purpose in getting on the witness stand to tell the jury from the statements of 1314 Elias Bayer what you thought was pertinent in the case, or what Elias Bayer himself said in answer to the questions of Mr. Wallace? A. My purpose in getting on the stand was to give my recollection of the answers Elias Bayer made in answer to questions of Mr. Wallace.

Q. Well, you have just stated a moment ago that you attempted to in substance confine yourself to what you thought were the pertinent parts of the statement of Elias Bayer. Didn't you say that to us a few moments ago? A.

I do not believe I said that. I believe that I said that I was more concerned with what I considered the pertinent portions. I was not attempting to recall verbatim everything that was said in the conversation.

Q. Well, while we are on that point, didn't you think it was important what Elias Bayer said about the first time the subject matter of money came up from Radovich to Samuel Bayer, and wouldn't you say that that was one of the most pertinent and important things in this lawsuit in your judgment? A. Yes, I concede that is important.

Q. Well, did you give the whole story about that in substance? A. To the best of my recollection.

Q. Do you remember Elias Bayer in answering Mr. Wallace's questions, stating that as soon as the first conversation between Captain Radovich and Samuel Bayer took place, when there was a conversation about $500 to pay the expenses of Mrs. Radovich going to California, do you remember Elias Bayer stating before you in answer to one of Mr. Wallace's questions, that immediately after Radovich walked out, Samuel Bayer had a conversation with Elias immediately afterwards? Do you remember that? A. I recall that—— 1316

Q. Well, will you answer the question yes or no? Do you recall it? A. I have to answer it no, if you insist on that.

Q. Then you don't recall Elias Bayer telling Mr. Wallace in the office of this interview about which you are called to testify about what you heard, that as soon as Radovich went out of the room he was talking to Samuel Bayer alone, that immediately afterwards Samuel Bayer said to Elias, "I don't know whether this is a holdup or a loan"? Do you remember that? A. I recall it, but not whether it was immediately. That was my distinction before. I was not attempting to run away from your question. 1317

Q. When do you think it was? A. I think it was shortly after Radovich left.

Q. You draw the refinements between shortly after and immediately. What is your distinction on that? Do you want to estimate it in the yardstick of minutes or seconds or hours? A. Well, I am not—I don't think it is necessary to estimate it. I was just trying to answer your question as you put it to the best of my ability.

Q. Well, was it right? A. I was not trying to quibble.

Q. Right after Radovich left, wasn't that the statement, that it was right after Radovich left? A. Some time after he left, just how immediately it was I do not recall.

Q. Well, it was the statement that Elias made that Samuel said to him, "I don't know whether it is a holdup
1319 or a loan." Do you remember that? A. Yes, I remember that statement.

Q. But you didn't tell the Court and jury anything about that, did you? A. I don't believe that I mentioned that.

Q. Did you leave that out purposely, or did you forget to tell them about it? A. I didn't leave it out purposely.

Q. You forgot to tell the jury about that, is that it? A. Yes.

Q. Well, don't you now think that it is an important matter?

Mr. McGohey: Your Honor, I object to the question of what the witness thinks is or isn't important. I think it speaks for itself.

Mr. Keenan: I think, if your Honor please——

1320 The Court: Overrule the objection.

Q. Don't you now think it is important? A. Well, I think the entire statement is important in that, too. I am not trying to run away with the question, but I think it is important.

Q. You were good enough to say that you wouldn't want to quibble. I am just asking, didn't you think it was important, don't you think it is important? A. Yes.

Q. Don't you wish now that you had told the Court and jury about that? A. Yes. I would like to be able to give a verbatim recital of what took place, but it is beyond my ability.

Q. Oh. But there was a stenographer there present, and they took it down in shorthand? A. Right.

Q. And were they capable stenographers, do you know? A. I consider them capable.

Q. Do you know them? A. I don't know them personally, no.

Q. Did you ever look over any of their work before? A. I may have.

Q. By the way, when these reports were transcribed by these six young ladies, they weren't court reporters, were they? A. It is my understanding that they are the stenographers attached to the United States Attorney's office and not court reporters. 1322

Q. That is right. And when they brought back their statements, did you know whether there were any corrections made or not? A. By the stenographers or by myself in reviewing the statements?

Q. By any of them. A. I know when I reviewed one statement I corrected the spelling of several names, that is about all.

Q. Just the spelling of names? A. Yes, sir.

Q. But outside of that, the little girl, as far as you knew, got everything just right, according to your recollection? A. I found nothing in reviewing the statement which clashed with my recollection. 1323

Q. Do you know if anybody else did? A. No, I don't. I didn't discuss that with anyone else.

Q. You don't know whether any changes were made or not, do you, other than spelling? A. Well, let me go a bit further on that. I don't know that any changes in spelling were made on any other copies. I made them on the copy that I was reading at the time, and I made them with my pen.

Q. Were there many of them or just a few? A. Oh, I would say they were a few.

Q. Now, Mr. Flynn, would you draw a distinction between Captain Radovich telling Samuel Bayer that he needed $500 to send his wife to California, or send his wife home, and asking for the $500? I am drawing the distinction now of the word "needed", that Captain Radovich said he needed $500, or Captain Radovich asking for the $500; would you draw any distinction between those two situations? A. As I understand it, it is asking for it to send his wife back or needing it to send his wife back.

Q. Yes. A. I would draw no distinction there.

1325 Q. You wouldn't. Not in the case where a charge is being made, in substance, to corruptly influence the judgment of an officer by paying him money; you wouldn't think it would make any difference whether Captain Radovich initiated the conversation by saying "I need $500 to send my wife to California," or Captain Radovich asking for $500; you wouldn't draw any distinction between them?

Mr. McGohey: I object to that as argumentative, your Honor, and it has already been answered.

Mr. Keenan: It is preliminary, your Honor.

The Court: I will permit him to answer.

A. Well, as I interpret that, I would draw no distinction because of the fact that he wanted $500. Now, it was an

1326 attempt to get $500.

Q. Do you happen to know that you said in answer to Mr. McGohey, quoting or summarizing or testifying with reference to what Elias Bayer said as to what he heard, "They heard Captain Radovich tell Samuel Bayer that he needed $500 to send his wife to California." Do you know that is what you stated here in the courtroom? A. In substance, yes. I mean—I don't know that I used the exact words; I don't remember the exact word.

Mr. McGohey: May I have that page, please?

Mr. Keenan: Yes, the page is 11fn.

Q. Now, when you gave your recitation of the story, the statement that Elias Bayer made in the presence of these United States Attorneys and myself and others, Mr. Wallace, when you described Elias Bayer's statement on what happened the first time that Radovich mentioned the matter of money to Samuel Bayer, you described it all in a little less than six lines of testimony, didn't you (showing transcript)? A. About six and a half lines there, as I see it. No, six lines.

1328

Mr. Robb: If the Court please, we can't hear him.

The Court: Speak out.

A. (Continuing) That is right.

Mr. Keenan: He said "six and a half", then "That is right, six lines."

Q. Less than six lines, isn't it, a little bit? A. (No answer.)

Q. And no place in that statement do you tell this Court and jury that Elias Bayer told you that he heard Captain Radovich ask for $500 (showing transcript)? A. That is right.

1329

Q. Do you recall Elias Bayer stating to you, before you at this conference, and I am always referring to this conference before Mr. Wallace, I won't keep repeating it, that he listened to the conversation outside the door, Elias did, the conversation between Radovich, Captain Radovich and Mr. Bayer, because it seemed peculiar to Elias that he was being asked to step out, that Radovich said he wanted to talk to Sam alone; do you remember that? A. Yes, I recall that.

Q. You didn't tell about that, did you? A. No.

Q. Then do you recall that Samuel—that Elias said, "I thought it was peculiar. He was a man I introduced to my brother and here he was having secrets from him." A. I recall that statement.

Q. "The door opened against the wall and we stood against the other side." Do you remember him saying that? A. I remember that.

Q. And do you remember him saying, "I heard him ask my brother for $500"? Do you recall that? A. Well, not in those specific words, but I recall the fact that he did say at the conference that Radovich had, as I recall, told Samuel Bayer that he needed $500 to send his wife
1331 back to Los Angeles. Now, when I selected the word "needed" at the time, I did not mean to place any particular emphasis on the word "needed".

Q. What is your recollection now as to— A. My recollection——

Q. Just a moment, please. What is your recollection now as to what Elias Bayer said he heard Captain Radovich state to Samuel? A. My recollection is still the same.

Q. Whether it was "needed" or whether he asked for it? A. Prior to the time you read that statement to me my recollection would be still the same, and that is, that he needed the $500.

Q. If the word used was "asked" would you say that that record would be wrong? Would that record be that, still, when emphasis is placed upon it, that the statement was
1332 that Radovich said he needed, rather than Radovich outright asking for it? A. Would I say that the record is wrong if the record includes "asked"?

Q. Yes. A. No, I wouldn't say the record was wrong.

Q. Do you remember Elias Bayer continuing and saying, "My brother hesitated awhile and told him he didn't have the money but he would try to get it." A. Was this the occasion of the first request by Radovich for $500?

Q. The first asking for it; yes; request? A. Yes, I recall that.

Q. Did he say that? A. Yes.

Q. And did you tell the Court and jury that? A. I don't recall telling that in my statement yesterday.

Q. Did you leave that out inadvertently or because you didn't think it was pertinent? A. I left that out inadvertently.

Q. We all leave things out now and then when testifying. Now, "he started to walk out and as he did we walked in and my brother says to me, 'I don't know whether this is a loan or a holdup.'" Do you remember hearing that? A. Yes.

Q. And do you remember, now does it refresh your recollection, that it was so close to the incident as it is described, 1334
"he started to walk out, and as he did we walked in"? Now does that refresh your recollection that it was immediately afterwards? A. It was close to the incident. I still don't know—don't say that it was immediately.

Q. You couldn't have it much closer than when Radovich walked out Elias walked in, could you? A. I agree with you that you couldn't have them passing each other much closer.

Q. That is getting down to pretty fine measurements, isn't it? A. But I don't know how long Elias was in the room before Samuel Bayer said that to him.

Q. Well, anyway, did you hear the statement made, "The door"—withdraw that—"The door opened up against the wall and we stood on the other side and I heard him ask my brother for $500. He said he needed it because I believe 1335
his wife was going to California. My brother hesitated awhile and told him he didn't have the money but would try to get it. He started to walk out, and as he did we walked in." Wouldn't that indicate that these people got in there even before Captain Radovich left the room where he was talking to Sam? Wouldn't it? A. Well, it would indicate to me that they got in there at approximately the time Radovich was leaving the room. It wouldn't indicate

to me that they got into the room before he actually left the room.

Q. We won't try to measure the space. A. Because I know the office and it is a small office.

Q. "And as he did"—that means Radovich, doesn't it—"he started to walk out, and as he did, we walked in, and my brother said to me, 'I don't know whether this is a loan or a holdup.'" Did Elias Bayer say that to you in his statement when he was reciting this conversation? A. Yes, sir.

Q. Now, did you leave that out inadvertently or because you thought it was not pertinent to tell this Court and jury in this case? A. I left that out inadvertently.

1337

Q. Wasn't that a rather important thing, when a claim is made of extortion, that Samuel Bayer used the words "hold-up" to an F.B.I. man? A. Samuel Bayer didn't use that word to me, if I understand you correctly.

Q. Oh, no, we are not talking about that. We are talking about Samuel Bayer using that statement to Elias, and we are talking about your recitation of what Elias said. That is what we are talking about.

Does the F.B.I. have to do with the suppression of kidnaping and extortion in the United States of America? A. Yes, sir.

Q. Do you happen to know that that was my work for many years in Washington?

1338

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection.

Mr. Keenan: I think it is pertinent.

The Court: I don't, and I sustain the objection.

Q. Now, Mr. Flynn, anyway, to an F.B.I. man, the subject matter of extortion is of extreme importance, isn't it?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain the objection. It is getting away from the subject and is not proper cross-examination.

Mr. Keenan: I note an exception to the Court's ruling and remarks.

The Court: Very well. You may have your exception to both.

Q. Mr. Flynn, didn't Mr. Bayer in his statement tell of the numerous times that Radovich had come to the office, that Captain Radovich had come to the office? A. Which Mr. Bayer?

Q. Elias Bayer. A. Elias Bayer? I believe that he did state that Radovich came to the office on numerous occasions. 1340

Q. You didn't say anything about that to the Court and jury in your recitation, did you? A. No, sir.

Q. And with reference to the uniforms, do you recall that Samuel Bayer—that Elias Bayer stated that Lieutenant Roeser spoke to him about getting a uniform at cost for Colonel Jacobson? A. Yes. My recollection is that Lieutenant Roeser introduced Colonel Jacobson to Elias Bayer and told him that Jacobson also wanted to get a uniform. I don't recall the words "at cost" there.

Q. Well, do you recall any other statement that Elias made as to what Roeser told him about uniforms, or why he wanted to try to help get a uniform for Colonel Jacobson? A. Not without reading the transcript. 1341

Q. Well, do you remember he said that "Lieutenant Roeser brought in Lieut. Col. Jacobson, he introduced me to him, and he also told me that Col. Jacobson would like to get some uniforms; also, it was very hard to get them at the PX at Mitchel Field." Do you remember that? A. Yes, I remember the statement that it was difficult to get them at the PX.

1342 *Gerald J. Flynn—For Government—Cross.*

Q. Do you remember that many questions were asked, then—Elias Bayer—as to whether or not he had met Schnozzel Durante and some of the night club leaders, and had introduced them to the officers? A. I recall that he was asked if he knew Jimmy Durante.

Q. Jimmy Durante. I think he calls himself Schnozzel in the pictures; is that right? A. I believe he does call himself that.

Q. And the questions were asked about Elias introducing these officers to top flight entertainers. Do you remember that? A. Yes.

Q. And the answers were in the negative, weren't they, that he had never seen them, except as you and I or anyone else might go in there and sit down at a table and see them entertain? Isn't that the answer that he gave? A. If I recall correctly, Elias Bayer said that he didn't know any of these top flight entertainers, and then he said that he didn't know Jimmy Durante, but that he spoke to him once.

1343

Q. Well, wasn't an effort being made by asking this question, to show you that this was elaborate entertainment of these officers and that——

Mr. McGohey: I object.

Mr. Keenan: Just a moment.

Q. (Continuing) And that they were being introduced to the top flight entertainers of the country, like Mr. Durante?

1344

Mr. McGohey: I object to that, your Honor.

The Court: Objection sustained.

Q. Wasn't that part of the release that was given from the office of the United States Attorney to the press?

Mr. McGohey: I object to that, your Honor. There is no proof of anything here about a release.

The Court: I sustain the objection.

Mr. McGohey: And I ask your Honor to direct the jury to disregard that remark of counsel.

The Court: I will so direct the ladies and gentlemen of the jury to disregard any inference which you may otherwise draw from the question.

Q. Do you remember the question there being asked by Mr. Wallace, "Did you ever introduce anybody to Durante?" Do you remember that question being asked? A. I remember the fact that he was asked if he had ever introduced anyone to any of these entertainers. It was in connection with that question that Durante's name came up. Now that is my recollection. 1346

Q. You have used a lot of words. I will ask you if the question was asked in your presence by Mr. Wallace, "Did you ever introduce anybody to Durante?" and the answer, "No, sir. During one of the visits to the office Colonel Jacobson asked me where my nephew was stationed." A. Substantially, yes.

Q. Now do you recall that Elias Bayer said in his statement that Colonel Jacobson brought up the subject matter of these boys, Usdan and Martin Bayer? A. I don't recall it just that way. I will be glad to give you my recollection.

Q. All right. What is your recollection? A. My recollection——

Q. As to who brought the subject matter up first, whether it was the Bayers who brought it up with Colonel Jacobson or whether it was Colonel Jacobson who brought it up, according to the testimony of Elias Bayer? A. My recollection is that there was a general conversation taking place concerning the two boys and that Jacobson asked where they were. 1347

Q. Now are you talking about Colonel Jacobson's statement or are you talking about Elias Bayer's statement to

you, to Mr. Wallace and Mr. McGohey? A. I am talking about Elias Bayer's statement made in the office of Mr. Wallace.

Q. Well, now, I will ask you if these were not the questions and answers with reference to the meeting with Colonel Jacobson and with reference to these boys, Melvin Usdan and Sergeant Martin Bayer:

"Q. Where was your apartment? A. I shared an apartment with two friends of mine, 120 Central Park South. A short time thereafter Lieutenant Roeser brought in Lieut. Col. Jacobson. He introduced me
1349 to him, and he also told me that Colonel Jacobson would like to get some uniforms, and also"—I will not repeat that part of the answer, I have read it before.

"Q. Where would you take them? A. Hickory House or a night club.

"Q. What night club? A. Martinique or Cocacabana.

"Q. Did you ever introduce them to any of the entertainers? A. No, sir, I did not."

And, by the way, Mr. Wallace here asked him these questions, didn't he? I didn't ask any questions, did I, of Elias Bayer? A. I don't recall that you—you asked some questions toward the end. Which one you asked I don't recall.
1350 Q. You don't know which one I asked questions of? A. I think that you—I know that there was a space there that you asked one or two questions. Now, just which one——

Q. Just which one it was you don't recall? A. I don't recall.

Q. I asked one or two questions. We won't quarrel about three or four. A. No, sir.

Q. To proceed, and I am reading this for the continuity— A. Yes, sir.

"Q. Did you ever meet Jimmy Durante?"—we did cover that. "Did you ever introduce anybody to Durante? A. No, sir. During one of the visits to the office, Col. Jacobson asked me where my nephew was stationed"—I will ask you if it is not your recollection that that was the first conversation as related by Elias, between Jacobson and Elias, as to these boys, Melvin Usdan and Sergeant Martin Bayer? A. Yes. Jacobson asked him where the boys were stationed.

Q. And you remember that the question was then asked by Mr. Wallace, "Before you met Radovich? A. Yes, sir. I told him they were clerks in Mitchel Field. He said, 'I can use clerks in my outfit.' He said, 'I am going to have him transferred to my outfit.'"

1352

Do you remember that question and answer? A. Substantially, yes.

Q. You didn't tell anything about that in your statement, did you? A. Well, I believe I did.

Q. What? A. I believe that I did. Not as completely, but I believe that I did.

Mr. McGohey: Page 10fn, next to the last paragraph, Mr. Keenan.

Mr. Keenan: All right. I certainly can make mistakes.

Q. Oh, on page 10fn—it is pointed out to me——

Mr. Keenan: And thank you, Mr. McGohey. 1353

Mr. McGohey: You are quite welcome.

Q. (Continuing) That in your story you stated—now about Elias Bayer—"He stated that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and they were clerks, and that Jacobson told him that he needed clerks and that he intended to have these boys transferred to his outfit." That is what you

said. But you didn't state that Colonel Jacobson asked him about the boys, did you? You left that out, didn't you? A. I concede that I didn't say that.

Q. Now was that inadvertence or was that because you didn't think it was pertinent? A. That would be inadvertence.

Q. You should have stated it? A. I don't believe that I should have.

Q. Was it inadvertently left out or deliberately left out?

Mr. McGohey: I submit that question has been answered. He stated that it was inadvertent.

The Court: I will let him answer that question.

1355

A. I say that anything that I left out, including this statement, would be inadvertence, and I don't consider that even at this moment that I should have put that statement in there. I think that I gave a substantial recollection of what occurred there.

Q. That is, you don't think it is important in the subject matter of the transfer of these boys or what happened to them, whether the boys were mentioned first by the officers or whether the boys were first mentioned to the officers by the Bayers? A. Well, yes, that would be important.

Q. Well, that is what I am driving at. A. But I already have said that Jacobson, according to my recollection, asked Elias Bayer where these boys were.

1356 Q. Mr. Flynn, will you bear with me for a moment? A. Certainly.

Q. I will read your testimony. Elias: "he said that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and that they were clerks." Now, do you think that tells the jury that it was Jacobson that first brought up the subject matter of the boys, or don't you think it rather leads at least to the inference that Elias Bayer took the matter up with Jacobson about the

two boys being out there in the first instance? A. I think when the——

Q. I am asking for your interpretation on this subject. A. As isolated by you there I think that it might lean to the interpretation you put on it.

Q. I am not an isolationist; but I want you to read this and tell me what I have isolated there (handing transcript)? A. Well, as I read this statement, I said he stated that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field and that they were clerks, and that Jacobson told him that he needed clerks and that he intended to have these boys transferred to his outfit. Now, that is my recollection of it. 1358

Q. Well, did I isolate any portion there, or didn't I read that whole answer to this jury?

The Court: Oh, I think you——

Mr. Keenan: Perhaps I am getting a little touchy too.

Q. Mr. Flynn, the fact is that when you recited Elias Bayer's statement in this case, when it came to the vital matter as to these boys and what was said about them, the fact is that Elias Bayer said that it was Jacobson that first asked about these boys, where they were, but when you testified you described that answer as Elias Bayer stating that he discussed the fact with Jacobson that his two nephews were stationed at Mitchel Field. 1359

Mr. McGohey: I submit, your Honor, that has been answered at least three times.

The Court: I sustain the objection, as being argumentative and repetitious.

Q. You left out in your statement that Roeser brought up the question of the uniform with reference to Jacobson;

you didn't refer to that in any way, did you? A. Possibly not as such. It is my recollection that I said that Roeser introduced Jacobson and stated that Jacobson wanted to get a uniform.

Q. It only took a few lines in that; will you look it over and tell us where you said that (handing transcript)?

Mr. McGohey: What page is he looking at?

Q. What is the page you are looking at?

Mr. Keenan: This is 11fn.

1361 A. No, on 10fn.

Q. Read it, please. A. I stated that the next officer he met was Colonel Jacobson, and also with Samuel Bayer's approval he took Jacobson into the I. Buss Uniform Company and introduced him and Jacobson was fitted for a uniform.

Q. All right. Is that your statement? A. No, I apparently left out the fact that Elias Bayer stated that—my recollection now is that he was—that he was introduced to Jacobson by Lieutenant Roeser. Is that your question?

Q. It goes a little beyond that, and I don't want to be tedious about it, but I think it is very important. You left out the fact that Roeser asked the Bayers if they couldn't get a uniform for Colonel Jacobson, didn't you?

1362 You left that out entirely.

Mr. McGohey: If your Honor please, I object to the form of the question—"you left out the fact that."

Q. You left out—I beg your pardon—you left out of the statement that part of Elias Bayer's statement where he said that Lieutenant Roeser was the one who asked him if he couldn't take Colonel Jacobson up and have him

measured or fitted for a uniform; you left that out, didn't you? A. I didn't say that.

Q. Are you drawing a distinction now between "leaving things out" and "not saying it"?

Mr. McGohey: I object to that.

Q. Then I will ask the question——

Mr. Keenan: I withdraw the question to keep the record straight.

Q. Did you fail to state that inadvertently or because it was unimportant? A. I failed to state it at the moment 1364
because at the moment my recollection was what I did state there.

Q. There was nothing wrong with your recollection about what you did say, if I may be permitted to say it, Mr. Flynn, because——

Mr. McGohey: I move to strike that out, your Honor. That is not a question. It is argument.

Mr. Keenan: I am trying to be fair with the witness.

The Court: I do not think those comments about his recollection are entirely necessary to the question.

Mr. Keenan: I did not hear you, your Honor.

The Court: Those comments are not necessary.

1365

Mr. Keenan: I think your Honor may not have understood me. I did not mean to comment about his recollection. I am attempting to state and to direct his attention not to the fact that he did tell the jury that Elias Bayer brought Lieutenant-Colonel Jacobson over to the Buss Uniform tailor shop, but that he left out, omitted, failed to state in his recollection of Elias Bayer's statement that he did so because Lieutenant Roeser asked him to.

Q. That is what I am commenting on. You left that out, didn't you? A. I left that part out because Lieutenant Roeser asked him——

Q. That is right. A. Asked him if he could get Jacobson his uniform?

Q. Yes. A. Yes.

Q. Now, did you leave that out inadvertently or deliberately? A. Purely inadvertently.

Q. And there is no doubt in your mind now that that is what Elias Bayer did say, that Roeser asked him to bring Colonel Jacobson over to get a uniform, to get measured for a uniform? A. Well, without refreshing my recollection by the transcript, my recollection is that Roeser introduced Jacobson to Elias Bayer and told him that Jacobson also wanted to get a uniform.

1367

Q. Now, coming to the subject matter of the conference or the talk, I am addressing myself now entirely to what you heard Elias Bayer say in answer to Mr. Wallace's question. What do you recall Elias saying as repeating the statement made by Captain Radovich when he came to tell Samuel about the boys being transferred in the first instance. Do you understand my question? A. No, I don't.

Q. Well, you recited the story about Captain Radovich coming in and seeing Samuel Bayer. This is the recitation of Elias Bayer that I have reference to now. A. Yes, sir.

1368

Q. That first he told him something about the boys being transferred in the first instance. You recall that? A. Yes.

Q. And do you know what discussion I have reference to? A. This is on the occasion that Radovich first asked Samuel Bayer for the $500?

Q. That is right, when he first asked him for the $500. Now, Elias Bayer told you that he was right in the room

with Radovich at the first part of the conversation? A. That is my understanding, yes, sir.

Q. That is before they got to the subject matter of money, right? A. That is right.

Q. Now, what was it that you recall Elias told you that Captain Radovich said in his presence about the boys and their transfer? A. I recall that Elias Bayer stated that Radovich told him that his company was breaking up, and that he would have to transfer the boys out to an outfit in Massachusetts.

Q. Now, you didn't tell that to the jury yesterday, did you? A. I told the jury my recollection at that time. I thought I mentioned that fact. 1370

Q. Have you looked at the transcript of the statements taken last February since you were on the witness stand last night, or yesterday? A. No, I have not.

Q. Did you discuss your testimony with anyone? A. No, I haven't.

Q. Now I will ask you if yesterday you didn't say this with reference to Elias's statement, on page 11fn:

"He also stated that during the summer of 1943 he was in Sam Bayer's office when Captain Radovich came in and told him that the boys would have to be transferred to another outfit for overseas duty inasmuch as Captain Radovich's outfit was breaking up."

Now you used the words, or you used the expression that Elias Bayer said that Radovich said the boys would have to be transferred for overseas duty yesterday, didn't you? 1371 I am asking you now what you said yesterday. A. I believe that I did, yes. May I see that?

Q. Yes. I am sorry, it is right there (handing). A. Yes, I used that outfit—pardon me—that phrase, "for overseas duty," yesterday.

Q. Are you now making a change in your statement of what you believe your recollection to be of what Elias Bayer said that Radovich stated in his presence? A. Yes,

I think it would. I am not absolutely certain about that overseas phrase there.

Q. Well, now, the matter of transferring these boys overseas is a vitally important thing in this prosecution, is it not? A. I agree with you, yes, it is important.

Q. Is there anything more important in it—or I will withdraw that; isn't it one of the most important points in the whole prosecution?

Mr. McGohey: I object to that, your Honor. I think it has been answered.

The Court: I will sustain the objection. That is a
1373 matter for argument.

Mr. Keenan: Is there any doubt about it, your Honor?

Mr. McGohey: I move to strike that out, too, your Honor, that comment.

The Court: I did not hear it.

Mr. Keenan: I beg your pardon?

Mr. McGohey: I think the jury did, your Honor.

The Court: I can't strike it out unless I know what it was.

Mr. Keenan: I will withdraw the remark and ask the Court to direct the jury to disregard it.

The Court: I will ask the jury not to regard it.

Q. In any event, have you changed your recollection
1374 from yesterday to today as to what Elias Bayer told you on the subject matter of whether Radovich told his brother that the boys were going to be shipped overseas in the conversation where he asked for the $500?

Mr. McGohey: I object to that question, your Honor. I object to the form of the question, has he changed his recollection?

The Court: I will overrule the objection. He may answer it.

A. Well, my present recollection is that he stated that the boys were to be shipped to an outfit in Massachusetts. I am not prepared to say my recollection is that he used the words "overseas duty" at the time he made the statement.

Mr. Keenan: Thank you, Mr. Flynn.

The Court: The Court will take a ten-minute recess.

(Short recess.)

1376

Q. Do you remember testifying about Elias, during this statement to Mr. Wallace and Mr. McGohey, and referring to a Colonel Jones? A. Yes.

Q. What is your recollection as to what Elias said he asked Colonel Jones to do? A. My recollection is that Elias Bayer said that he asked Colonel Jones if the boys could be transferred and kept at the field, and that Colonel Jones told him that he would try, but that he never did anything.

Mr. Keenan: Would you be good enough to read that answer to me, please, Mr. Stenographer?

(Answer read.)

1377

Q. I will ask you to look at page 13fn of the record and see if that is what you said (handing)? A. It isn't exactly what I said.

Q. What you said yesterday was that he asked Colonel Jones if he could get the men transferred? A. That is right.

Q. Now, today, you say your recollection is that he asked Colonel Jones if he could get the men transferred and kept on the field? A. That is right.

Q. You are adding "and kept on the field" now? A. That is my present recollection.

Q. Is it different than your recollection was yesterday? A. Not substantially.

Q. Well, where were the boys at this time, according to Elias Bayer? A. I believe the boys were at Westover and Bradley Fields.

Q. All right. Now, Westover and Bradley Fields were airborne engineer units? They were in the airborne engineers, weren't they? A. That is my understanding.

Q. I mean Melvin Usdan and Sergeant Bayer? A. That is my understanding.

1379 Q. And there would be a difference in asking Colonel Jones to transfer them out—transfer them from Westover Filed and keeping them at Westover Field, wouldn't there? A. There would be a difference.

Q. A rather sharp difference, wouldn't there be, in having a man transferred from a field, or having him kept at a field? A. Well, I think that would depend on the purpose.

Q. We are talking now about your relating what you heard a witness say. That is the subject matter under discussion. Now, what did you hear him say? Did he say he asked Captain Jones to transfer the boys from Westover Field, from the airborne engineers, or from Westover Field, or to keep them there a little longer? A.

1380 I—my present recollection of what Elias Bayer stated, without looking up the transcript, is that he asked Colonel Jones to transfer the boys.

Q. I will ask you if this is not the question that was asked Elias Bayer in your presence, and concerning which you are giving your recollection now to this jury and Court, asked by Mr. Wallace in February, in this interview we are talking about:

"Q. What did you say to Colonel Jones? A. I explained that my brother was worried, very worried about the boy, and if they could keep him on the field a little longer it would be very good."

Isn't that what Elias Bayer told you he told Colonel Jones, and which you are relating to this jury? A. May I see that transcript, please?

(Transcript handed to witness.)

A. (Continuing) The statement is substantially—the statement is exact.

Q. Do you mind reading it? A. Not at all. 1382

Q. Again? A. Just the portion which had to do with——

Q. Colonel Jones. A. Yes. "What did you say"—the question is, "What did you say to Colonel Jones?" The answer is, "I explained that my mother"—I guess he means brother here——

Q. Yes. A. —"was very worried about the boy, and if they could keep him on the field a little longer it would be very good.

"Q. What did Colonel Jones say? A. He said he would try, and nothing was done."

Q. Now, Mr. Flynn, that is not in accordance with your testimony to the jury as to what happened at all, is it? A. Well, I think——

Q. You are mistaken about it, aren't you? A. I am not 1383 mistaken over the fact that Elias Bayer stated that he talked to Colonel Jones——

Q. Oh, no. A. —and about the fact that he discussed with Colonel Jones the movements of the boy.

Q. Oh, no. But you are mistaken— A. I am, I find we have left out the point that you bring up.

Q. Well, you stated that he asked Colonel Jones if the latter could do anything to have the boy transferred, pe-

riod. Isn't that your testimony yesterday? A. That is right.

Q. Now you now read what happened last February, haven't you? Now, it is "I explained that my brother was very worried about the boy, and if they could keep him on the field a little longer it would be very good." Those are not the same things at all, are they? You just made a mistake in that point? A. Well, I prefer to accept the transcript rather than my recollection. I was testifying yesterday from my recollection.

Q. Yes. A. Without seeing the transcript.

Q. We all know that. A. Now, when I see the tran-

1385 script——

Q. Yes. A. I am inclined to accept the transcript.

Q. Well, is that as far as you would go to say that you are inclined to accept the transcript? A. I am going to accept the transcript.

Q. You will just change the word "inclined" to "going to". The point of it is that yesterday when you testified before the jury you said Elias told Mr. Wallace that he asked Colonel Jones to have the men transferred from the airborne engineers. Now you say after looking at the transcript that it was just the opposite, that he asked to have the boys kept there a little longer, is that right? A. I say that the transcript is correct. Yesterday my testimony was to my recollection.

1386 Q. Well, I am not talking about recollection, but one is the opposite from the other, isn't it? A. I don't agree that one is opposite from the other.

Q. You don't agree that "transferring the men out" is the opposite from "keeping them where they are"? A. I think we are quibbling on words here.

Q. I beg your pardon. I am just asking you what you testified about yesterday. A. I stated what I testified to yesterday.

Q. Yes. A. As being what you read.

Q. You did not tell the jury yesterday that Samuel Bayer said that "I didn't like it, Mr. Wallace. I didn't know what to think, whether it is a loan or a hold-up." You did not tell the jury about that yesterday, that Samuel Bayer said that to Mr. Wallace in your presence, did you? A. I don't recall saying that yesterday.

Q. Well, do you recall now whether or not Samuel Bayer did say that in answer to Mr. Wallace's question back in February? A. That was on the first visit there, on the occasion of the first request?

Q. Elias was talking about the first asking for money, yes. A. I don't recall that without looking at the tran- 1388
script.

Mr. Keenan: I would like to have the record show that you have had a moment or two to look at the transcript.

Q. What do you say now? A. I say that I will accept the record rather than my recollection, and I prefer the record.

Q. Well, what do you say now, now that your recollection is refreshed by the record about that? A. About what? May I have the rest of the question?

Q. Yes. Did Samuel Bayer say in answer to Mr. Wallace, "I didn't like it, Mr. Wallace. I didn't know what to think, whether it is a loan or a hold-up. So I said to 1389
him, 'I have not got no money on me now. Come in tomorrow and I will give it to you'"? A. Yes.

Q. Well, you left that out yesterday, didn't you? A. Yes.

Q. Did you do that purposely, or did you do it because your memory was faulty? A. I left it out inadverently.

Q. The jury should have known about that to get the pertinent story.

Mr. McGohey: I object to that, your Honor, and move to strike it out.

The Court: Mr. Keenan, that is a matter of argument.

Mr. McGohey: I move to strike it out, your Honor.

The Court: I will sustain the objection to the question.

Q. And Samuel Bayer said that he told Captain Radovich at that time, "I told him that is all I could get together. I could give him the $500. I just wanted to show him that it wasn't so easy to get money." Did he say
1391 that in your presence? A. Yes, I recall him saying that.

Q. You did not tell the jury about that, did you? A. I don't recall that I did.

Q. Was that inadvertently, or by design? A. That would be inadvertently.

Q. Did he say when he, Radovich, was walking out, "My bookkeeper and my brother walks in and she said, 'I heard all about it,' and I said, 'And I don't know whether it is a hold-up or a loan. I don't know.' My brother shrugged his shoulders." Do you remember that being said in your hearing in answer to Mr. Wallace's question? A. Not of my own recollection; I recall it now that you have read the transcript.

Q. Well, did you leave that out yesterday? A. I did
1392 not mention that yesterday.

Q. Was that through inadvertence or by design? A. Inadvertence.

Q. Inadvertence? A. Yes.

Q. Now, do you remember that when he came for the second $500, Captain Radovich, as related by Samuel Bayer, in answer to the question of Mr. Wallace, he said, "I haven't got it, Walter. You know that's a lot of money." Do you remember that statement being made? A. No, I don't remember that exact statement.

Q. Would you accept it as being made? A. I would accept—I would be inclined to accept that statement. There was a delay, as I recall it, and he stated that to him after a while.

Q. And further did he say, "He said, 'I haven't got it, Walter; you know that's a lot of money,'" and that Captain Radovich answered, "Well, Sam, I need it, and get it for me." Do you recall that statement being made? A. May I see it, please?

Q. Yes (handing to witness).

Mr. McGohey: If your Honor please, may I have the last question asked read to me, please? 1394

(Question read.)

Mr. McGohey: That is a quotation from the transcript.

A. The transcript is correct to my recollection.

Q. Well, is it now your recollection that what Samuel Bayer said upon that subject and what you did not tell the jury yesterday in that respect was that Samuel Bayer said, "I haven't got it, Walter. You know that's a lot of money." And Radovich said, "Well, Sam, I need it, and get it for me." Is that in accordance with your refreshed recollection? A. That would be in accordance with my refreshed recollection.

Q. Yes. A. Yes.

Q. And did Samuel Bayer proceed and say "I didn't know what to do. I didn't know what to say to him, but I was scared if I didn't give it to him he would take it out on my kids. So I promised him I will give it to him." Was that statement made in your presence by Samuel Bayer in answer to Mr. Wallace's question? A. This is on the occasion—I don't know that—this is on the occasion of the second visit? 1395

Q. Yes. A. Yes, I believe that he did say that he didn't know what to do, that he was afraid that Captain Radovich might take it out on his children.

Q. On his kids. A. Well, his kids.

Q. Do you know how many children Sam Bayer has? A. I recall that he has three sons.

Q. Any daughters? A. I don't know.

Q. You have been working on this case for six or eight months and you don't know how many children Sam Bayer has? Are you telling that to this jury?

Mr. McGohey: I object to that, your Honor.

1397 The Court: Objection sustained.

Mr. Keenan: All right.

Q. Well, anyway, you recall now that he did say, "I told him I didn't know what to do, I didn't know what to say to him, but I was scared if I didn't give it to him he will take it out on my kids"? A. Yes.

Q. You didn't tell that to the jury yesterday, did you? A. No.

Q. Was that left out by design, or inadvertence? A. That was left out by inadvertence.

Q. You didn't think that was an important part of this conversation?

Mr. McGohey: I object to that, your Honor.

1398

Q. Or did you?

The Court: I will let him answer.

A. I think that the entire conversation is important.

Q. But not— A. I was giving—I was giving my recollection without refreshing it by using that transcript.

Q. Were some parts of the conversation more important than others in your mind?

Mr. McGohey: I object to that, your Honor.
The Court: I will let him answer.

A. Oh, yes.

Q. And wasn't this one of the most important parts of the conversation as far as Sam Bayer's statement, that he was frightened and scared not to pay this money or it would be taken out his boys who were out in the camp under Captain Radovich?

Mr. McGohey: I object to that, your Honor. It is argument.
Mr. Keenan: Oh, your Honor——
The Court: I will sustain the objection. 1400
Mr. Keenan: Exception.
The Court: Very well.

Q. Well, when you used the expression in answer to my question, "He said he was afraid Captain Radovich would do something to his children," you did not mean to intimate by that that there was anything said by Samuel Bayer that anything was going to happen to the boys that were out there in the Army, in the uniform of the Army, as privates under Captain Radovich, didn't you?

Mr. McGohey: I object to that.
The Court: I will overrule the objection.

A. As far as I am concerned, we are discussing only the 1401
two boys right now, and no mention has been made previously to my recollection in our conversation about any other children, and I intended that to be only with reference to these two boys.

Q. Now, when you use the word "boys" and use the word "children", you use them interchangeably? A. They may be so used.

Q. Because they are very, very young, both of them?

Mr. McGohey: I move to strike that out, your Honor.

Q. Is that why you used the word "children"?

Mr. McGohey: I object, your Honor.
The Court: I will let him answer.

A. I consider—no, I consider that the sons and daughters of any person are the children of that person.

Q. All right. A. No matter what their age is.

1403

The Court: Well, I think we have had enough discussion on that.

Mr. Keenan: All right. Thank you.

Q. You tried to give this jury a faithful and accurate recollection that you had of these statements of these two men without in any manner leaving out anything of any importance in this proceeding? A. I tried to give them my present recollection as unbiased and as faithful as I could.

Q. You did not try to shade it one way or the other? A. No, sir.

Q. Or leave out any points here and there? A. I did not

1404 deliberately try to shade or leave out any point.

Q. You are not particularly anxious to gain or win in this prosecution?

Mr. McGohey: I object to that, your Honor.
The Court: I overrule the objection.

A. Well, it won't mean anything to me personally whether I gain or lose, or win or lose the prosecution.

Q. But it has been a matter to which you have devoted the greater part——

Mr. McGohey: I object to this, your Honor.

The Court: You have already asked about that.

Mr. Keenan: All right, your Honor. I beg your pardon. That is all. Wait just a minute.

Q. Now, that I have sort of stimulated your recollection a little bit, is there anything else you would like to tell the jury in that same spirit of fairness; anything that you think you have left out that they ought to know about, or any inadvertences of moment, so that a fair statement can be given? 1406

Mr. McGohey: I move to strike that last part out, "so that a fair statement can be given", your Honor.

Mr. Keenan: I will withdraw that last part.

Q. Anything that you left out. A. Well, I don't recall anything at the moment, but I would be glad to have you refresh my recollection.

Q. Well, I am just asking you if you got any of your own? A. I don't recall anything at the moment.

Q. Do you remember Samuel Bayer stating that Captain Radovich had called him several times after his boys were transferred to Westover Field, and that Samuel Bayer told him in substance to leave them alone, that he was satisfied where they were? Do you recall Samuel Bayer stating that? A. I recall that. There was, I believe, one telephone conversation mentioned by Samuel Bayer to that effect. 1407

Q. Just one? A. That is all I recall.

Q. Do you remember Samuel Bayer telling you, "After they were at the medical detachment at Mitchel Field for a short while, I believe less than a week, they went to Bradley Field, and he"—stating about his boy—"my kid,

when he got there, called me on the phone. As a matter of fact, he called me the very day because I asked him to specially, and he told me what a nice place it was, and that he met a nice sergeant from Brooklyn, and he was very happy, and I was very happy and contented as long as the kid was happy up there." A. Yes, I remember him saying that the kid called him and told him he had met a nice sergeant from Brooklyn. I remember that.

Q. And that he was happy there? A. And that he was happy.

Q. And you didn't tell that to the jury yesterday, did you? A. No, I don't believe I did.

1409 Q. And do you remember him saying, "It went along two or three weeks. The kid called me lunch hour or home at night, and he talked to his mother, too, and he kept on telling us how happy he was, and he said he was going home for a week-end with some of his friends." A. I don't recall that of my own recollection.

Q. Is that right (handing witness)? A. That is right.

Q. You did not tell the jury about that yesterday? A. No.

Q. "I don't know. It is two or three weeks had passed, whether it was Sunday or a holiday, but I was home that morning. Captain Radovich called me [redacted] said 'Sam, I found out who did the transferring', and [redacted] said, 'If you will give me $1500 Sam, I will have him transferred back to Mitchel Field.' I said, 'Walter, please forget all about it.
1410 The kids are very happy. They met a nice captain, a nice sergeant.'" Now, the latter part of that, do you recall Samuel Bayer stating that in your presence? A. Yes.

Q. Did you tell that to the jury yesterday? A. I believe I told them that Samuel Bayer told him not to bother about that.

Q. Well, that part that I have reference to, describing in essence that the boys were happy out there at the field? A. Oh, no, I did not mention that yesterday.

Q. You did not mention that? A. No.

Q. But Sam did to Wallace, didn't he? A. Yes.

Q. Now, do you remember after that he said, "Maybe about a month later, he"—meaning Radovich—"called me up in the place and says the same thing. 'Sam, you are foolish. Now I will be leaving the country soon. If you give me the $1500 I will have the boys transferred to Mitchel Field.'" Do you remember the second telephone conversation? A. I don't recall him testifying or stating that.

(Mr. Keenan hands transcript to witness.)

A. Yes.

Q. Do you recall that now? A. Yes, I recall it. 1412

Q. Did you leave that out inadvertently or deliberately? A. No, I left that out inadvertently.

Q. That is just a fault of memory, is that right? A. Yes, sir.

Q. Do you recall that he said that he didn't hear from him again until the McAlpin meeting? A. Yes, I recall that.

Q. And that after the McAlpin meeting, do you recall he said he didn't hear from him for maybe six weeks or two months after that? A. Yes.

Q. You didn't tell that yesterday, did you? A. I think I mentioned yesterday that they met at the McAlpin and that subsequently they met at Cavanagh's Restaurant on 23rd Street. 1413

Q. But you didn't tell about Samuel Bayer saying that those were the only two conversations that he had with Radovich from the time these boys went to Westover Field? You didn't tell that to the jury, did you? A. Well, I wouldn't recall that I said they were the only two, or that they were the only two.

Q. You used the expression that Sam stated that Radovich then contacted him. Did you mean by that "contacted

him" that he called him on the telephone, or he came to see him personally? A. Well, what was the occasion of this?

Q. That is about after the transfer was made to Westover Field. A. May I see that, please?

Q. That portion of the testimony there (handing). A. Well, I used the word "contacted", and it is my recollection that the contact was made by telephone.

Q. Do you remember Sam telling about the meeting with Captain Radovich just before Captain Radovich left for Goldsboro? A. Is this the meeting at Cavanagh's Restaurant——

1415 Q. Yes. A. —or the day afterwards in Sam's office?

Q. At Cavanagh's Restaurant. Do you remember Sam stating that that very day his boy, meaning Sergeant Martin Bayer, called him from Westover Field, "and he tells me, 'I and Milly are leaving for Goldsboro'"? A. I recall that.

Q. You didn't tell that yesterday, did you? A. I don't believe I did.

Q. Was that inadvertence, or was it deliberate? A. Inadvertence.

Q. Failure of memory, or wasn't important enough? A. It was pure inadvertence.

Q. Failure of memory?

Mr. McGohey: I submit the question has been an-

1416 swered, your Honor.

The Court: I sustain the objection.

Mr. Keenan: Well, all right.

Q. Do you remember him saying, "We met him at the restaurant and we had a couple of drinks and sat down to eat, and he started to tell us he was leaving for Burma, India, on a very dangerous mission, and they were lucky if they would be back in about eight months, and that mission would write history"? A. Yes, I recall that.

Q. And that he said, "I signed out a request for the two boys. I am taking them with me." Do you recall his saying that? A. Yes.

Q. You didn't tell us about that yesterday, did you? A. I think I did substantially.

Q. About him stating, "I signed out a request for the two boys"? A. Perhaps not those words, but I think I did state that he was going to take the two boys with him.

Q. Well, did you tell yesterday that he said he was going to take the two boys with him when leaving for Burma, India? A. I believe that I did say that he was leaving for Burma. I don't think I mentioned India at all.

Q. You stated that he requested that the two boys come 1418
with him. That is the way you told the story yesterday, isn't it? A. May I see it?

Mr. McGohey: I suggest you read all of that paragraph of the witness' testimony.

Mr. Keenan: All right, I will read it all. Is that agreeable to the Court? It is very short, I think. It is about making an appointment to see Miss Solomon and Samuel Bayer at Cavanagh's. Page 6fn. I suppose that is what you want?

Mr. McGohey: I don't know what part you are going to talk to him about. You quoted part of what appears to be the second full paragraph on that page, and I suggest that you quote the full paragraph.

Mr. Keenan: Well, I will do it. I will even quote 1419
the one before that.

Mr. McGohey: That is quite all right with me.

Q. And I am reading from the record now of what your testimony was yesterday: "About a month or so thereafter Radovich telephoned Sam Bayer's office and made an appointment to see Miss Solomon and Sam Bayer at Cavanagh's Restaurant. When he arrived he told Sam

Bayer that he was being sent out on a dangerous mission to Burma, and that he had requested that the two boys come with him." Now, do you wish me to read after that, Mr. McGohey?

Mr. McGohey: Yes.

Mr. Keenan: I mean, do you think I ought to in order to make the question intelligible and fair? If you do, I will.

Mr. McGohey: I do not know what you are going to ask, Mr. Keenan. I can't tell that.

The Court: Go on and complete it.

1421 Mr. Keenan: It does not have to do with the subject matter, your Honor. I am trying to please Mr. McGohey.

Mr. McGohey: If it does not, I do not want it read, your Honor. Whatever is quoted ought to be quoted fully.

The Court: Please proceed.

Q. Now your recitation was, and you used this language, that he was being sent out on a dangerous mission to Burma, and he had requested that the two boys come with him. A. I recall that.

Q. Now that is not what Sam Bayer said, is it? A. It is not the exact words, I agree with you. I was giving substantially my recollection.

1422 Q. That might sound as though it was a request of these boys, that he requested that the two boys come with him? A. I did not so intend.

Mr. McGohey: I object to that.

Q. You didn't mean that.

Mr. McGohey: I object to that as argumentative.

The Court: I will let him answer.

A. I did not so intend.

Q. Did you know that it was a voluntary outfit, the Commando unit they were talking about? A. I have been told so.

Q. You know it now, and you knew it at the time you testified? A. Yes.

Mr. McGohey: Now I think that the next paragraph ought to be read.

The Court: You can do that on redirect if you wish to. Go ahead. 1424

Q. The next paragraph was: "Sam stated that he pleaded with Radovich to leave the two boys at home, but that Radovich refused and told him that he would have to pay $5,000 if he wanted the boys transferred out of this unit, and that he had to make up his mind quickly." Is that right? That is what you said? A. That is what I said yesterday, yes.

Q. Now I will ask you if this is not what was stated by Sam Bayer: He said, Sam, "Walter, please leave them alone. I never done you any harm. Why do you want to take it out on me and the poor kids? He said 'Sam, I will tell you what I can do for you. If you will give me $5,000 I will have them transferred elsewhere.' He said, 'Sam, 1425
don't think it is for me. I have to give up $2,000 to somebody and $1500 to another fellow, and all I will get will be $1500.'" Sam said, "I pleaded with him, Mr. Wallace, and he was just like a stone." Did you tell that to the jury? A. No, I did not use that word.

Q. Do you know where these boys are now? A. Not of my own knowledge, no.

Q. Do you know where Sergeant Martin Bayer is? A. Not of my knowledge.

Q. Have you inquired in the Army? A. I haven't made any inquiries as to the whereabouts of these boys.

Q. Did you find out what happened to him before the 15th day of July, 1945, while the Government claims this conspiracy was on?

Mr. McGohey: I object to that, your Honor.
The Court: Objection sustained.
Mr. Keenan: Exception.

Q. Did you find out what happened to Martin Bayer after he went to Delaware?

1427

Mr. McGohey: I object to that, your Honor.
The Court: Objection sustained.
Mr. Keenan: I note an exception.
The Court: Very well.

Q. Do you know about a File No. 201 in the Army that every private, every soldier and enlisted man has that gives his history and what happens to him? A. I have heard the term.

Q. Do you know what it is? A. I believe that I have a slight acquaintance with what is kept in that file.

Q. Tell us what was kept in Martin Bayer's file, if you know?

1428

Mr. McGohey: I object to that. There is no proof that he ever saw it, and it is irrelevant.
The Court: That might have some relevancy so I am going to allow him to answer it.
Mr. McGohey: If he ever saw it.
The Court: Of course, if he knows.

A. I do not recall that I ever saw Martin Bayer's 201 file.

Q. That would have the complete history of these transfers, wouldn't it? A. As I understand it, it would be a history of a man's movements at a particular base of assignment.

Q. Well, isn't it a continuing history of a man as long as he is in the Army? A. I may be wrong. As I say, I have only a slight knowledge of the 201 file, but it is my understanding that a 201 file stays at the base and is a history or a record of the man's movements and record while at that base. When he moves to another base they set up another 201 file.

Q. And where would the last one be of Martin Bayer in the United States of America, if you know? 1430

Mr. McGohey: I object to this, your Honor. This witness isn't qualified as an expert.

The Court: I am going to sustain the objection.

Q. I would like to ask you if you have conferred with the Intelligence Division of the United States Army in this investigation about these transfers?

The Court: All right.

A. Yes, I have conferred with them.

Q. Whom have you talked with? A. Well, I have talked to Lieutenant Colonel Miller, I have talked to Judge Harmeling—rather, they are of the Judge Advocate's office, and not the Intelligence Service. 1431

Q. Yes?

Mr. McGohey: Your Honor, I object to the whole line of questioning.

The Court: I am going to sustain the objection.

Mr. Keenan: May I ask your Honor if it is because the witness has failed to show whether he is qualified to answer the question or if the Court feels it is not a

pertinent matter to be brought out at this trial, or whether it is not pertinent matter to be brought out at this time.

The Court: As to whom he has conferred with it seems to me to be a matter not material or relevant.

Mr. Keenan: It is only preliminary, your Honor. I want to ask this witness for his knowledge, and he has indicated something about knowledge that the District Attorney claims a limited knowledge of.

The Court: Knowledge of what?

Mr. Keenan: Knowledge of what records are in the Army and whether or not this man knows about

1433 such records and where they are. I want to find them your Honor and bring them into this court room.

Mr. McGohey: I object to that statement, your Honor, and move to strike it out.

Now I would like to be heard on it, your Honor, either here or at the bench.

The Court: All right then, come up here.

(Conference at the bench, off the record.)

The Court: Ladies and gentlemen, I am going to excuse you for lunch now, as I want to take up something, so I will excuse you until 2.15.

(Recess until 2.15 P. M.)

1434

AFTERNOON SESSION.

GERALD J. FLYNN resumed the stand.

The Court: Have you further questions, Mr. Keenan?

Mr. Keenan: Yes, your Honor.

Cross-examination by Mr. Keenan.

Q. I would like to ask the witness if Mr. McGohey was in the room when the witness came in to this interview with Samuel Bayer and Mr. Wallace? A. If Mr. McGohey was in the room when Samuel Bayer entered? 1436

Q. No, when you entered it. A. When I entered, in the interview with Samuel Bayer, no, Mr. McGohey was not in the room at that time.

Q. Do you recall that after the first three questions, the fourth question was, "Suppose you go right ahead and tell us everything you know in connection with Radovich?" Do you recall that? Was that question asked while you were there? A. I don't recall that specific question.

Q. Do you remember the next answer: "My boy was stationed at Mitchel Field," and then the next question by Mr. Wallace, "That's Martin Bayer? A. Martin Bayer was there for about three or four months when I met some officers. Their names were Colonel Jacobson, Colonel Vidal, and Lieutenant Roeser. I met him through my younger brother." 1437 Were you there when that question was asked? A. It is my recollection that I heard that part of it, that I came in around that time.

Q. Now the next was two answers with just a single notation of "The State of Maine" that took approximately five pages of the record. Were you there at the beginning of that recitation? A. I was there at the point where Samuel Bayer was talking about his son Martin being

stationed at Mitchel Field, and I was there during that section of the statement, I believe where he went on to tell his story.

Q. Was Mr. McGohey there during that time when those long answers were given? A. No, I don't believe he was.

Q. You know the record states when he came in? A. Yes.

Q. Does it state when you came in?" A. I don't recall whether it does.

Q. Have you looked at it to examine it to see if it does? A. I have read a copy of the transcript.

Q. Yes. A. Yes.

1439 Q. Did that show when you came in? A. Not that I recall.

Mr. Keenan: Now, your Honor, I think I would like to return to the question asked just before adjournment. May I have the question asked the witness, because I believe there was an objection at that time.

The Court: It was my understanding that I would sustain the objection and that that matter would not be pressed pending the production of some records.

Mr. Keenan: Then in view of your Honor's ruling to that, I have no further questions to ask at this time.

The Court: All right. Have you any questions?

Mr. Robb: Just one or two, yes, sir.

Cross-examination by Mr. Robb.

1440 Q. Agent Flynn, in your investigation of this case you devoted considerable time and effort to an attempt to determine the circumstances surrounding the obtaining by these various officers of certain uniforms, did you not? By "officers", I mean Vidal, Jacobson, Radovich and the others. A. Yes, we considered that.

Q. You investigated that incident, did you not? A. That the officers obtained uniforms?

Q. Yes, sir. A. Yes.

Q. And you also devoted some effort to finding out who paid for the uniforms, didn't you? A. That is right.

Q. That was a rather important matter, right? A. Yes.

Q. And in that connection, Mr. Flynn, it was important, was it not, to determine whose idea it was, in the first place, that the Bayers should pay for them, isn't that right? A. I am not sure I understand your question.

Q. Wasn't it important to find out who suggested, if anybody did, that the Bayers and not the officers should pay for the uniforms? A. I would say yes.

Q. In other words, whose idea it was that the Bayers should pay for them; isn't that right? A. Yes.

Q. Now in the interview of the statement which he made 1442
to Mr. Wallace, didn't Elias Bayer tell Mr. Wallace in your presence that when he took those officers to the Busch store or shop he understood and intended that the officers were going to pay for the uniform themselves? A. I believe that is my recollection.

Q. Yes, sir. Did you tell that to the jury yesterday? A. I don't recall that. I would have to see the record.

Q. Would you look at it, sir? I hand you the record. A. No, I did not.

Q. And didn't Elias Bayer also say to Mr. Wallace that he, Elias, had spoken to Colonel Vidal or at least hinted to him that payment of those uniforms by him was due, by him and the other officers, was due? Didn't Elias say that in substance to Mr. Wallace? A. I don't recall that statement. If it appears—I would like to see the transcript. 1443

Q. I show you this transcript which has just been handed to me by Mr. McGohey very kindly, and direct your attention to the bottom of page 5. A. I recall that the transcript would be correct in answer to a question, "Did you ask Vidal to pay for his uniform?" The answer is, "Well, directly asking, I wouldn't say, no. It was definitely decided that they were to pay at wholesale price, and I did pass the remark, I believe, once, that these uniforms hadn't been paid for as yet."

Q. Read the next. A. "And what did Vidal say? A. Nothing much. He changed the subject and I just rode along with them." "Well, is there any reason why you shouldn't ask him to pay for the uniform? A. No, I don't."

Q. All right. Now, Agent Flynn, do you recall now that in that same, or, rather on that same occasion, Samuel Bayer told Mr. Wallace that this man Harold Busch at the uniform company, called up Sam and got after him about the uniforms not being paid for? A. No, I don't recall that of my own recollection.

Q. Do you recall— A. If I may interrupt you, I recall that there was some remark about the Busches asking
1445 for payment, but I don't recall whether Samuel Bayer said it or whether Elias Bayer said it.

Q. Do you recall Samuel Bayer also saying to Mr. Wallace that he hinted to Colonel Vidal or said in Colonel Vidal's presence that Harold Busch had been asking him for the money for the uniforms? A. Not specifically, no.

Q. You don't recall that? A. I would have to see the transcript.

Mr. McGohey: What page is that?

Mr. Robb: Page 11 on this one.

Mr. Keenan: Your Honor, in view of the statement just made by the witness, I ask that the testimony of this witness regarding these remarks, statements made by Samuel Bayer and Elias Bayer be stricken,
1446 since the witness himself can't remember which of the two, Samuel Bayer or Elias Bayer, said it, and at the same time the Court is asking this jury to hold that thought in mind until the end of this cause.

The Court: Motion overruled.

Mr. Keenan: Exception.

The Court: Go ahead.

Q. Don't you recall that Samuel Bayer said that Busch called him up and said these uniforms had not been paid

for? A. I say specifically I do not recall that. If you give me the page, why, I will——

Q. I show you the transcript, it is page 11 here on this one I have, and ask you if you will look at that and then tell us if those statements were not made by Samuel Bayer? A. I agree with the transcript.

Q. In other words, Samuel Bayer said that Harold Busch called him up and told him that these uniforms had not been paid for and Samuel Bayer afterwards mentioned that statement by Harold Busch in the presence of Colonel Vidal and the other officers; right? A. I didn't catch that last part of your question.

Q. Let us break it up. Samuel Bayer said that Harold Busch called him up and told him these uniforms had not 1448
been paid for, that is right, isn't it? A. Correct.

Q. And didn't he also say that he, Samuel Bayer, afterwards mentioned his conversation with Harold Busch in the presence of these officers? A. Yes. He stated, "I hinted to him," meaning Vidal, "that the boys wanted, you know, they wanted to get paid, in a nice way. I didn't say to them——"

Q. Would you read down to the bottom of that page, too? A. "Question"—the last——

Q. The last on that page and the first on the next. A. "Did you say specifically to your brother Eli, that Harold Busch wanted you to pay for the uniforms? A. I said to him, Harold asked for the money for the uniforms.

"Q. Who was present there when you said that? A. 1449
Vidal, Jacobson and Roeser."

Q. All right. Now, agent, you did not tell the jury about that yesterday, did you? A. I don't recall that I did. I did not recall it until I refreshed my recollection here.

Q. Yes, sir. But your testimony is that the matter of who paid for these uniforms and who originated the idea that the Bayers were going to pay for them was an important matter, wasn't it? A. It was important, and I believe that I testified as to who paid for the uniforms.

Q. Yes, sir. Don't you think that those statements had an important bearing on the origin of the idea that the Bayers should pay for them and not the officers? A. From that point of view, yes.

Q. From what point of view? A. From the point of view as to who initiated it.

Q. Yes, sir. Now, agent, in your investigation did you also give consideration to the matter of the obtaining by Colonel Jacobson, or the alleged obtaining by him of some automobile tires from the Bayers? A. I was told by Colonel Jacobson that he had obtained automobile tires.

Q. And you heard him testify——

1451 Mr. Keenan: I object. Just a minute.

The Court: What is that?

Mr. Keenan: Am I to understand now that this witness is quoting what Colonel Jacobson said to him?

The Court: He was asked if he gave consideration to it.

Mr. Keenan: Well, I object to it.

The Court: All right. I direct the jury not to consider that. You were not asked what Colonel Jacobson said. You were asked, in your investigation, if you considered the matter of the tires.

The Witness: Yes.

Q. You investigated that, did you not? A. No.

1452 Q. Wasn't that a rather important matter? A. Well, it could be considered important.

Q. Didn't you consider it important?

Mr. McGohey: I object to this line of questioning, your Honor.

The Court: I sustain the objection.

Q. You did investigate it, though, didn't you? A. I considered it. I didn't investigate it.

Q. Now isn't it a fact that in his statement to Mr. Wallace, Samuel Bayer said that he had never given Mr. Jacobson any tires? A. I believe that is my recollection.

Q. Yes, sir. Did you tell the jury that yesterday? A. I do not recall. I would have to look at the record as to whether I mentioned that or not at the time.

Q. Would you look at the record? A. No, it does not appear that I did mention it yesterday.

Q. You didn't; that is the fact, isn't it, Mr. Flynn? A. Yes.

Mr. Robb: Thank you. That is all.

The Court: Any redirect on this phase of the examination? 1454

Mr. McGohey: No, I have no redirect examination.

The Court: All right. You may proceed.

Mr. McGohey: I said I had no redirect.

The Court: I know, but you have further examination of this witness, have you not?

Mr. McGohey: Oh, yes, your Honor, but at this time I now offer in evidence the transcript of the statement of Samuel Bayer and the transcript of the statement of Elias Bayer.

The Court: Is there objection, gentlemen?

Mr. Robb: Has it been identified, if the Court please?

Mr. McGohey: The transcript of the statement made in the office of Mr. Wallace at which I and the agent were present. That is the original transcript. I offer it in evidence. 1455

Mr. Keenan: I object to them until they are properly authenticated and they bring in the little girls that took it down, so that I can have a chance to ask them some questions about it.

Mr. McGohey: I will be glad to do that.

The Court: All right.

Mr. McGohey: I make the same offer with respect to the testimony of Elias Bayer.

Mr. Keenan: And the same objection to it, until we get to it properly.

Mr. McGohey: May I withdraw this witness now and bring those witnesses in?

The Court: Yes.

(Witness temporarily withdrawn.)

FRIEDA MEISNER, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

1457

Direct examination by Mr. McGohey.

Q. Miss Meisner, now in answering questions will you please keep your voice as high as you can so that the last juror in the box and all of counsel and all the people at this table may hear you? What is your present occupation, Miss Meisner? A. Stenographer.

Q. By whom are you employed? A. The United States Attorney's office.

Q. You are employed here in this office? A. Yes.

Q. On September 7th of this year 1945— A. February 7th.

Q. I beg your pardon. On February 7, 1945, were you

1458 called to the office of Mr. Wallace? A. Yes.

Q. And when you came there did Mr. Wallace ask some questions of a man who was in the room? A. Yes.

Q. And did you make stenographic notes? A. I did.

Q. Would you let me finish my question? A. I am sorry.

Q. Did you make stenographic notes of the questions that were asked and the answers that were made? A. I did.

Q. And thereafter did you transcribe your stenographic notes on the typewriter? A. I did.

Q. And on the pages that you typewrote did you identify them by your initials? A. I did.

Mr. McGohey: May I have that exhibit marked for identification.

(Marked Government's Exhibit 8 for Identification.)

Q. Now, do you have with you the notes that you took that day? A. Yes. Here they are.

Q. When you took notes, did you take them on more than one occasion that day in Mr. Wallace's room? A. No, 1460
just once.

Q. You just took them once? A. Yes.

Q. I show you Government's Exhibit 8 for Identification and ask you to look at it and tell us whether or not that is an accurate transcription of the notes which you took that day? A. Yes, it is.

Q. And you made this transcription yourself? A. Yes.

Q. Now, will you indicate to me where your stenographic notes begin in that book? A. Right here (indicating).

Q. Will you tell me where they continue through? A. Down to here.

Q. Including everything on that page? A. Yes.

Mr. McGohey: Will you mark those for identification, that is, pages 155 to 163 inclusive? 1461

(Marked Government's Exhibit 9 for Identification.)

Mr. McGohey: I now offer in evidence Government's Exhibit 9 for Identification, being the stenographic notes.

Mr. Keenan: You are offering it in evidence?

Mr. McGohey: Yes.

Mr. Keenan: Objected to.

The Court: Do you wish to examine before I pass on this question of admissibility?

Mr. Keenan: Yes. I would like to ask a question or two.

The Court: All right.

Mr. Keenan: May I proceed now?

Mr. McGohey: May I interrupt for just a minute? May I offer at this time the transcript?

The Court: I thought you had already offered that.

Mr. McGohey: I don't think I offered it in evidence, your Honor.

The Court: You offer the whole transcription; you
1463 had not offered that particular portion.

Mr. McGohey: I have offered the whole transcript, but now I am offering so much as has been identified by this witness as the transcription of her notes.

The Court: All right. You may examine. I will pass upon the admissibility, if you wish.

Preliminary cross-examination by Mr. Keenan:

Q. Are you a court reporter? A. No, I am not.

Q. Have you ever taken a statement of witnesses as they have spoken from the witness stand, transcribed their evidence? A. Where do you mean, witness stand? In court?

Q. Yes. A. No.

Q. Were there any inaccuracies in your transcription?
1464 A. I don't think so. I may have had a "g" on one word; I think; I don't remember exactly.

Q. That would be "g" for G-man? A. No, I think I may have "alone" or "along", something like that.

Q. Making it what? A. I think I may have a "g" on the word "alone"; I am not sure. I don't remember; I didn't touch it. If you want me to look through, I will. It was just a typographical error.

Q. How many pages did you transcribe? A. I don't remember. Let me look at it and I will tell you.

Q. I mean, how many pages of notes did you take, first? A. Eight and three-quarters.

Q. Pages of shorthand notes? A. Yes.

Q. How many pages of transcript does that make? A. Almost five full pages.

Q. And have you checked those back carefully with the notes? A. Yes, I have.

Q. When did you do that? A. I think I did that last Thursday or Friday.

Q. And you didn't find any inaccuracies at all— A. No.

Q. —except possibly the letter "g" on one word? A. Yes. 1466

Q. Do you ever make any mistakes in your transcription that you find out later, that you have taken something down wrong? A. Well, you see, I don't because if I don't understand anything or I don't hear anything, I usually repeat it and correct it right then and there in front of the witness.

Q. Did you do that in these five and a half pages at all of testimony? A. I don't think I did in that case. If I look in my notes I can see, but I don't think I did, because I think Mr. Bayer spoke fairly slowly.

Q. You think —A. He spoke fairly slowly, I believe, because my notes are very good. If he had spoken very rapidly my notes would be big and distorted.

Q. If he spoke rapidly, your notes would be big and distorted? A. Yes, and I have very nice notes on it; they are very clear. 1467

Q. How long have you been attached to the United States Attorney's office? A. Over twelve years.

Q. Who else worked on this besides you? A. Well, there are several other girls. I believe Mr. Wallace would be in a better position to tell you who those were.

Q. How many girls are there that worked with you on this? A. I couldn't tell you that either. I mean I didn't check on that or count them. A girl relieved me, and I can tell you who she is; other than that——

The Court: What is the materiality of the girls who worked with her?

Mr. Keenan: I would like to know from this witness, your Honor.

The Court: She testified she took certain dictation and left.

The Witness: I can tell him who relieved me, your
1469 Honor, that is all.

The Court: All right.

The Witness: Mrs. Ginsberg followed me, so I know.

Q. You were never called to verify these notes or to check back on the notes, on the transcript, with your notes, until last Thursday? A. That is right.

Mr. Keenan: That is all.

The Court: All right. You may be excused.

Mr. Robb: We have no questions, your Honor.

The Court: All right, you may be excused. And the exhibits offered pursuant to this testimony will be admitted. Call the next witness.

1470 Mr. Keenan: The record shows our objection——

Mr. McGohey: I didn't hear what was said.

The Court: I understood your objection to be to the admission of the statement until it had been identified and authenticated by a witness.

Mr. Keenan: I did not say that, your Honor. I object to the introduction of it on the ground that it it inadmissible for reasons that were urged before your Honor for a full afternoon in this court room.

The Court: Oh. That objection will be overruled. Exception noted. With the same——

Mr. Robb: I hadn't thought of that, because we also objected on that ground, but on that ground alone—

The Court: Very well, then, and it may be considered that the same objection is made to all the different portions on both sides.

Mr. Robb: Yes, sir.

The Court: That objection being, ladies and gentlemen, as to the admissibility, and I repeat to you what I said when the verbal testimony from the witness was admitted, that you are to consider these statements as evidence in your consideration of the case 1472
of the person making the statement, but not consider it as evidence as to the co-defendants. All right, call the next witness.

(Government's Exhibits 8 and 9 for Identification received in evidence.)

The Court: That admonition goes throughout all the statements presently involved.

Mr. Keenan: If your Honor please, I want to renew the objection on the additional ground that your Honor has already stated that you would not permit some of the exhibits which you read to be introduced because of extraneous matter that you thought was not proper to be introduced in this court. I don't know which your Honor had reference to. But I want to save my objec- 1473
tion and exception in the event it is contained in either of these two documents.

The Court: You will have to make your objection more specific than that. If you wish to object to any particular portion I will hear it.

Mr. Keenan: I can only say to your Honor that I can't make it any more specific from the information I have. And, furthermore, I make an objection to it

on the ground that it is improper to introduce in bulk a statement of that kind without seeing whether there is prejudicial matter that is not germane to this case under the rules of evidence, and I cite to your Honor the case of——

The Court: No, I don't want to hear a legal argument, sir.

Mr. Keenan: All right, your Honor. I am willing to give it.

The Court: That is, on that matter. I have admitted a certain portion of the statement. If there is another one offered I will pass on it when it is presented. If you have a specific objection I will entertain it. Proceed.

1475

FANNIE R. GINSBURG, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Mrs. Ginsburg, will you please keep your voice high enough and loud enough so that the last juror here and all counsel and the others at this rear table here can hear you clearly? A. Yes, sir.

Q. By whom are you employed? A. By the United States Attorney's office.

1476

Q. What is your position? A. I am a stenographer, taking legal work and also taking and transcribing hearings.

Q. How long have you been employed by the United States Attorney's office? A. About twenty-four years.

Q. I direct your attention to the date of February 7, 1945, and ask you if on that day you were called into the office of Mr. Wallace, down on the fourth floor? Were you? A. Yes, sir.

Q. And when you came there did you take notes of questions which Mr. Wallace asked and answers which were made by one of the men in the room? A. Yes, sir.

Q. And specifically, was one of the persons who was answering those questions a man named Samuel Bayer? A. Yes, sir.

Q. Do you have your notes of the questions and answers which you took down in stenographic notes? A. Yes.

Q. Will you indicate where the notes begin here and where they continue, for how long? A. Here (indicating).

Mr. McGohey: I ask that these pages, I haven't counted them, down to here, be marked for identification. 1478

The Witness: Only on the one side.

(Marked Government's Exhibit 10, consisting of 44 pages, for Identification.)

Q. Now on that occasion did you take your notes at one time, or did you take some notes at one time and be relieved and come back and take notes later on? A. No, sir; all at the one time.

Q. All that you took you took at one time? A. Yes, sir.

Q. And did you thereafter transcribe those notes? A. Yes, sir.

Q. And you typewrote your transcription? A. Yes, sir.

Mr. McGohey: Will you mark this for identification, please. 1479

(Marked Government's Exhibit 11 for Identification.)

Q. I show you Government's Exhibit 11 for Identification and ask you if that is a true and accurate transcription of your stenographic notes as they appear in Government's Exhibit 10 for Identification? A. Yes, sir.

Q. And you have examined them? A. Yes, sir.

Mr. McGohey: I offer in evidence Government's Exhibits 10 and 11.

Mr. Keenan: I object. I don't care for any voir dire examination. I am objecting to these exhibits coming in.

The Court: All right, sir. Objection overruled.

Mr. Keenan: And I want to state the specific ground in the language of the court, that it contains material that has not been proven or shown to be germane to the issues of this case, and improper.

1481 The Court: I am going to do this about that. Let me finish with this situation. It is my understanding that you do not propose to read these exhibits to the jury at this time, or do you?

Mr. McGohey: I do not propose to read them at this time, your Honor.

The Court: All right. Well, now, inasmuch as the exhibit is somewhat lengthy, I am going to suggest or direct that as to any matter in any of the exhibits which you consider and which you contend is irrelevant and immaterial and inadmissible for that ground, that you take time to consider the matter and make a motion to strike such matter as you consider improper, upon that ground.

1482 Mr. Keenan: I except to your Honor's ruling on that point, on these following grounds: that your Honor has already permitted to be introduced without qualification and over objection, and with great respect, without desiring to listen to legal argument, for the reason for the objection, and now in the presence of the jury an anomalous proceeding is taking place in which it is suggested that after it has been introduced over objection it may be restricted by a motion to strike, and that such direction is being made by the

Court in the presence of the jury, which is prejudicial to the defendants, and I except on that ground, your Honor.

The Court: Motion overruled.

Mr. Robb: If the Court please, may I address your Honor?

The Court: Yes, sir.

Mr. Robb: If the Court please, we have been more or less on the outside looking in on this particular matter. I haven't had a chance yet to see these statements. I have glanced at them, I glanced at them this morning very briefly while I was having my breakfast. I think the jury ought to have these stenographic statements so far as they have anything to do with this case, 1484
but I understood from your Honor that these statements may contain some matters which do not have to do with this case. I would like to have a chance to read them prior to their being read to the jury, to see if there is anything in there which ought not to go in.

The Court: It is exactly that that I suggested.

Mr. Robb: Yes, sir. Your Honor's thoughts and mine run along the same channel.

The Court: I would be glad to let you have that privilege and entertain at any time before they are read any motion which you may wish to make as to materiality of any particular portion of the statement.

Mr. Robb: Before they are read, yes.

The Court: Yes. 1485

Mr. Keenan: I would like the record to show, your Honor, that we make our objection, and in view of the Court's statement that he had already examined these exhibits and that if they were offered, some of them, he would not permit them to be brought into this case because he felt there was material in them that was improper.

The Court: I think you have stated your position.

Mr. Keenan: Thank you, your Honor.

The Court: Objection overruled, with the understanding that if you desire to move to strike out any portion thereof, as to immateriality, I will consider your motion. Proceed.

Mr. McGohey: Your Honor, may the record state that the very copies of transcript which are now being introduced were delivered to counsel for Samuel Bayer and Elias Bayer yesterday afternoon.

The Court: I think the record already so shows.

Mr. Robb: That is true, if your Honor please, but I didn't get a chance to see them; and I am not counsel
1487 for Samuel and Elias Bayer.

The Court: I understand that. Go ahead.

(Government's Exhibits 10 and 11 for Identification received in evidence.)

Mr. Keenan: I think the record also should show, your Honor, that when I called for them for the week-end, so that I would have time to look them over, the United States Attorney refused to permit me to see them.

The Court: Your statement may go in. All right, sir.

Mr. McGohey: Just one more question of this witness.

1488 Q. Can you tell me from your notes who it was that followed you? A. Yes, sir, I can. Relieved by L.D., which stands for Lena D'Elia.

Mr. McGohey: I have no further questions of the witness.

The Court: Do you wish to cross-examine? All right, call the next witness.

1489

LENA M. D'ELIA, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Miss D'Elia, on February 7, 1945, by whom were you employed? A. I was employed in the United States Attorney's office in this building.

Q. Have you since left that employ? A. I resigned on September 4, 1945.

Q. How long had you been employed by the office of the United States Attorney? A. Exactly nineteen years.

Q. What was your duty in the United States Attorney's office? A. Well, I was a law stenographer, and in my capacity I also took statements.

1490

Q. On February 7th, 1945, were you called to the office of Mr. Wallace on the fourth floor of this building? A. Yes, sir, I was.

Q. Did Mr. Wallace ask questions of a man named Samuel Bayer? A. Yes, sir, he did.

Q. Did Samuel Bayer make answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. I did.

Q. Do you have your notebook with you? A. I have.

Q. Will you indicate to me the pages on which those stenographic notes appear? A. Down to here (indicating).

1491

Mr. McGohey: I ask to have these pages, page 39 and one-half of 46, marked for identification.)

(Marked Government's Exhibit 12 for identification.)

Q. Now after taking these stenographic notes did you transcribe them? A. I did.

Q. And have you compared your transcription with the original notes? A. I have.

Mr. McGohey: May I have this marked for identification.

(Marked Government's Exhibit 13 for Identification.)

Q. I show you Government's Exhibit 13, and I ask you if that is a true and accurate transcription of your stenographic notes? A. Yes, sir.

1493 Mr. McGohey: I offer in evidence Government's Exhibit 12 for Identification and 13 for Identification.

Mr. Cohen? How many pages?

Mr. McGohey: Of the transcript? Four and a half.

Mr. Cohen: Five pages.

Mr. Keenan: We object, for the same reasons stated before, your Honor.

The Court: Very well. The objection is overruled and the exhibits accepted upon the same terms and conditions as those previously offered. Proceed.

(Government's Exhibits 12 and 13 for Identification received in evidence.)

Mr. Robb: If the Court please, I don't want to be captious, but I assume we have the same general ob-
1494 jection about these, to all these exhibits.

The Court: It is so understood.

Mr. Robb: Yes. The same exception.

Mr. McGohey: Just one more question of this witness, your Honor.

Q. Can you tell me from your notes which stenographer relieved you? A. You mean that continued then?

Q. Yes; continued taking the notes after you? A. She was Celia Reitman; she relieved me.

The Court: All right. You may be excused.

CELIA REITMAN, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Miss Reitman, will you please keep your voice up 1496
high enough so that the last juror over here and all these gentlemen at the counsel table can hear you clearly? A. Yes, sir.

Q. On February 7th, 1945, by whom were you employed? A. United States Attorney's office.

Q. Are you still employed by the United States Attorney's office? A. No, sir.

Q. When did you leave the United States Attorney's office? A. The end of February, 1945.

Q. For how long a period were you employed by the United States Attorney's office? A. For three years.

Q. What was your duty in the United States Attorney's office? A. During most of that time I was hearing stenographer, in the conscientious objector cases.

Q. On February 7, 1945, were you called to the office of 1497
Mr. Wallace? A. Yes, sir.

Q. And did Mr. Wallace ask questions of a man named Samuel Bayer? A. Yes, sir.

Q. Did Samuel Bayer make answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. I did.

Q. Do you have your notebook containing your stenographic notes? A. Yes, sir.

Q. Will you indicate to me where in that book your notes appear? A. From pages 1 to 15.

Mr. McGohey: I ask that these pages 1 to 15 inclusive be marked for identification.

(Marked Government's Exhibit 14 for Identification.)

Q. Now, after taking those stenographic notes did you afterwards transcribe them? A. I did.

1499

Mr. McGohey: May I have that marked, please.

(Marked Government's Exhibit 15 for Identification.)

Q. Now I show you Government's Exhibit 15 for Identification, and ask you if that is a true and accurate transcription of the stenographic notes which you took on that day? A. Yes, sir, it is.

Q. You have compared them? A. Yes, I have.

Q. They are true and accurate? A. Yes, sir.

Mr. McGohey: I offer Government's Exhibits 14 for Identification and 15 for Identification in evidence.

1500

Mr. Keenan: May the record show the same objection for the same reasons?

The Court: On the part of counsel for all defendants, the same objection. The same ruling. The exhibits are admitted under the same terms and conditions. Proceed.

(Government's Exhibits 14 and 15 for Identification received in evidence.)

Q. Would you look at your notes, and can you tell me from your notes who was the stenographer that followed you in taking the notes? A. Miss Kravet.

Mr. McGohey: I have no further questions.
Mr. Keenan: I would like to ask just one question.

Cross-examination by Mr. Keenan.

Q. When did you transcribe these notes? A. Right after I took them.
Q. And you haven't seen them since until Thursday of this last week? A. That is right. 1502

Mr. Robb: No questions.
The Court: Call the next witness.

EDITH KRAVET, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. McGohey.

Q. Miss Kravet, you are employed, are you not, by the United States Attorney's office? A. Yes, sir.
Q. And how long have you been so employed? A. Twenty years. 1503
Q. What is your duty in the office? A. I am a stenographer.
Q. In the course of your duties have you taken hearings? A. Yes, sir.
Q. Now on February 7, 1945, were you called to the office of Mr. Wallace? A. Yes, sir.

Q. Miss Kravet, will you please keep your voice up high enough so that the last juror and everybody at this here table can hear you? A. Yes, sir.

Q. When you came to Mr. Wallace's office, while you were there, did he ask questions of a man named Samuel Bayer? A. Yes, sir.

Q. And Mr. Bayer made answers to those questions? A. Yes, sir.

Q. Did you make stenographic notes of the questions and answers? A. Yes, sir.

Q. Do you have your notebook with you? A. Yes, sir.

Q. Will you indicate to me in the notebook where the
1505 stenographic notes appear? A. Here (indicating).

Q. Beginning on page 179? A. Yes, sir.

Q. And how far do they continue? A. Through page 189, inclusive.

Mr. McGohey: May I have that stenographic notebook marked for identification?

(Marked Government's Exhibit 16 for Identification.)

Mr. McGohey: Will you also mark this paper for identification?

(Marked Government's Exhibit 17 for Identification.)

1506 Q. Now, after taking those stenographic notes, did you thereafter transcribe them? A. Yes, sir.

Q. And will you look at Government's Exhibit 17 for Identification and tell me if that is a true and accurate transcription of your stenographic notes? A. Yes, sir. I would like to tell you though in reading over the notes I found that I had transposed in two places two words.

Q. Will you indicate that to us? A. Yes. On page 6, in answering a question I have——

Q. Never mind that. Where did you make the transposition? A. This should be "regular", not "written". In our shorthand, when I read it quickly——

Mr. Robb: What is that?

Q. Will you speak up loud enough so that counsel can hear you? A. Yes. One word I wrote down as "written". The word is "regular". They look somewhat similar in shorthand, and when I transcribed it I did not note that error.

Q. So that the word "written" as it appears on page 6 of Government's Exhibit 17 for Identification is inaccurate, and it should be "regular"? A. Right. And there is one other point. On page 4, I left off the "not"—"was not"—"was not there". I wrote "was"; and when I looked in my notes it is "was not". 1508

Mr. McGohey: Your Honor, I ask that the witness be allowed to make in ink the corrections which she has just stated in the transcript, so that the transcript will conform to her notes.

Mr. Keenan: I have no objection to that, your Honor.

(Witness complies.)

Q. Now with the correction of those two words on Government's Exhibit 17, is Government's Exhibit 17 for Identification now an accurate transcription of the notes that you took on that day? A. Yes, sir. 1509

Mr. McGohey: I offer in evidence Government's Exhibit 16 for Identification and 17 for Identification.

Mr. Keenan: We object, your Honor, for the same reasons, the former reasons stated.

The Court: The objection of counsel for all parties is overruled and the exhibits are admitted under the same terms and conditions as those previously stated. Any questions of this lady?

(Government's Exhibits 16 and 17 for Identification received in evidence.)

Q. Can you tell me from your notes here who it was, if anybody, who relieved you in taking these notes? A. Miss Celander relieved me.

Mr. McGohey: I have no further questions.

1511 Mr. Keenan: Just one question.

Cross-examination by Mr. Keenan.

Q. Young lady, did you discuss this with anybody from the United States Attorney's office? A. I did not discuss anything. I called them up and told them that I noted those two errors, that is all. That was the extent of the conversation.

Mr. Keenan: I see. That is all.

The Court: Call the next witness.

Mr. Keenan: Your Honor, to save time, as far as the defendants Bayer are concerned, we don't know how many more of these ladies there will be, but I

1512 assume there will be several of them now for Elias, if there are different ones, and we are willing to stipulate that if called they would state that they were accurate transcriptions of their notes, that they are not court reporters but they believe them to be accurate and have checked them. To save time.

The Court: What have you to say?

Mr. Robb: That would be entirely agreeable to us, if the Court please.

The Court: All right. Let it be so stipulated and the documents offered and admitted over the same objections of counsel for both defendants under the same terms and conditions.

Mr. McGohey: Then, your Honor, may I have them all marked?

The Court: Yes. Just have them all marked and introduced as I indicated, and while you are doing that we will take a ten-minute recess, ladies and gentlemen.

Mr. McGohey: Your Honor, perhaps to save time, there are four sets of papers comprising the statement of Elias. Could we have them all marked as 1514
one exhibit? I withdraw that request, your Honor, and we will have the transcription of each——

The Court: Let it be uniform.

Mr. McGohey: And have each one of them marked in order, marked in evidence.

(Government's Exhibits 18, 19, 20, 21 and 22 received in evidence.)

(Short recess.)

Mr. Wallace: Mr. Henderson.

Mr. McGohey: If your Honor please, it is possible that this man Henderson has not come down on this floor. We didn't know whether we would call him or not, but we have another witness here that we could call. Henderson is in the building, but he may be up 1515
in my office.

The Court: Either way you wish.

Mr. McGohey: It might take a few minutes to get the witness, if he is not here, and rather than waste the time, we can call another witness. We will withdraw him and call Lasko.

WILBUR G. LASKO, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Wallace.

Q. Sergeant Lasko, you are a member of the United States Army? A. Yes, sir.

Q. How long have you been a member of the United States Army? A. Two years and eleven months.

Q. Would you tell us what your occupation was in private life before you entered the Army? A. I was a secretary and conference reporter for The Texas Company.

1517 Q. How long did you have that job? A. Approximately fourteen years.

Q. Just what did your duties entail when you were working for The Texas Company? A. I was a secretary and conference reporter, reported conferences.

Q. Reported them in shorthand? A. Yes, sir.

Q. And where are you stationed now? A. Mitchel Field.

Q. Where were you stationed in August, 1944? A. At Mitchel Field.

Q. What were your duties at that time? A. I was assigned to the Judge Advocate's office as a court reporter.

Q. Now on August 15, 1944, were you at 30 West 21st Street, here in New York City? A. Yes, sir.

Q. At that time did you meet a man named Samuel Bayer? A. Yes, sir.

1518 Q. Do you recognize Samuel Bayer in the courtroom? A. He is sitting directly behind you.

Q. Did you meet Elias Bayer? A. Yes. I believe if you will move, I will recognize him. He is seated to the right of Samuel Bayer.

Q. Were you accompanying an officer at that time? A. Yes, sir.

Q. Whom were you accompanying? A. Lieutenant-Colonel George Snyder.

Q. Were you in the office of the Plymouth Thread and Yarn Company? A. Yes, sir.

Q. At that time did you make notes of a conversation between Colonel Snyder and Samuel Bayer, and subsequently Colonel Snyder and Elias Bayer? A. Yes, sir.

Q. And did you reduce them to your notebook? A. Yes, sir.

Q. Now, would you tell us what Colonel Snyder said to Samuel Bayer and what Samuel Bayer said to Colonel Snyder on August 15, 1944, in your presence? A. Well, when we arrived at the Plymouth Thread Company——

Mr. Keenan: I object to this, your Honor. 1520

Mr. Robb: We object to this.

The Court: Very well. Upon the same grounds as you formerly stated to the other statements, the objections are overruled; exceptions may be noted. I direct you ladies and gentlemen of the jury in considering the evidence of these statements that you consider the statements only in your consideration of the case of the person making the statement, and not as evidence against the other defendants in the case. All right.

Mr. Wallace: Your Honor, in connection with these statements it is the position of the Government that they are such statements that might be found and might be used against all defendants.

The Court: Let me hear them. I will leave my 1521 instruction as it is now, ladies and gentlemen. Let me hear the statement. If I feel that I should amend the admonition to the jury, I will consider that.

Mr. Wallace: All right, your Honor.

Q. Will you proceed? A. When we arrived at the Plymouth Thread Company, Colonel Snyder introduced himself as Colonel Snyder, the First Air Force, who is a

representative of the United States Army in connection with charges pending against Major Radovich.

Q. Then what did Samuel Bayer say? A. He acknowledged the introduction, and then I was introduced to Samuel Bayer as a stenographer accompanying Colonel Snyder.

Q. And what happened then? A. Then Colonel Snyder interviewed Samuel Bayer.

Q. Have you your notes of that interview? A. Yes, sir.

Mr. Ansell: Introduced who, Mr. Wallace?

Mr. Wallace: Introduced Sergeant Lasko.

1523 Q. You have to keep your voice up, Sergeant. A. I am sorry, sir.

Q. Have you your notes in your possession at the present time? A. Yes, sir, I have.

Q. Of that interview? A. I have them here.

Q. Will you read those notes for us, please? A. Yes, sir.

Mr. Keenan: I take it it will not be necessary to repeat the objection, your Honor.

The Court: It is understood that the objection is continued.

The Witness: The interview took place. Do you want the background or——

1524 Q. No. I want the notes. A. I see. The witness was instructed as to his right; every witness under the law should be told in advance that anything that you say may be used against you. If you make any statement that will incriminate you, it may be used against you. Your rights are that you need not say anything of an incriminating or degrading nature under the law, and in fairness to you I want to explain to you you do not have to make a statement that would besmirch your character, that will lower

you. All I ask is that you tell us the truth to enable us to piece together this entire case as there are some loose ends you can assist me on.

The witness stated he understood. The witness was sworn.

"Will you please state your name and occupation? A. Samuel Bayer, 30 West 21st Street, New York City.

"Are you the father of Martin Bayer? A. I am, yes, sir."

Do you wish it this way, sir, or do you want question and answer, the way I have it in the book? 1526

Q. No. You may proceed the way you have been. A. "Are you also the uncle of Melvin Usdan? A. Yes, sir.

"Do you know or have you ever met the following named Army officers: Colonel Vidal? A. Yes.

"Lieutenant-Colonel Jacobson? A. Yes, sir.

"Major Radovich? A. Yes, sir.

"And Lieutenant Roeser? A. Yes, sir.

"Did you at any time make an offer of money or other remuneration to any of the above mentioned officers with reference to the transfer of your son or nephew? A. No, sir.

"When was the first time and under what circumstances did you meet Lieut.-Col. Jacobson? A. I met him through my brother, Elias Bayer. 1527

"Under what circumstances? A. They came up here. They used to come up here to see my brother.

"How about Colonel Vidal, Major Radovich and Lieutenant Roeser? A. Exactly the same thing.

"Did you ever give Major Radovich any gifts for his baby? A. No, sir.

"Did you ever take Major Radovich to a uniform concern, namely Lauderstein Uniform Company, for the purpose of buying a uniform? A. No, sir. I don't even know the name.

"Did you and Major Radovich ever discuss the purchase of tires? A. No, sir.

"Did you at one time offer to reimburse Major Radovich for his purchase of tires? A. No, sir.

"Did you once call Major Radovich and ask him to come in to see you in your office as you had something very important to ask of him? A. No, sir.

"Do you know a full Colonel in the First Air Force?
1529 A. What do you mean by a full Colonel?

"An Eagle Colonel? A. I don't know any more than those mentioned.

"You don't know any officers other than those? A. No, sir.

"Coming back to the uniform dealer we discussed before, have you ever done business with the I. Buss & Company? A. Yes, sir.

"Did you ever pay for uniforms for Colonel Vidal, Jacobson, Roeser and Radovich? A. No, sir.

"Did you at any time speak to any officer in the Army or civilian for the purpose of effecting the transfer of your son and nephew? A. No, sir.

"I again give you an opportunity to tell me what
1530 you really know of this case. From my knowledge of this case you are withholding the truth, and I must warn you of the possible consequences of such an act. A. I am not.

"Is there any information you would agree to offer in connection with this matter? A. I have none, sir.

"During the past five months has anyone approached you to discuss the matter with you in any way whatsoever? A. No, sir.

"The witness was then excused and called back, reminded he was under oath and asked:

"Did you ever know Captain Pepper? A. No."

Q. Did that conclude the statement of Samuel Bayer? A. Yes, sir.

Q. At that point was Elias Bayer interviewed? A. No, not at the time that Samuel Bayer was being interviewed. He was asked to leave the room.

Q. But after Samuel Bayer was interviewed, did Samuel Bayer leave the room? A. Yes, sir. He was asked to leave the room and send Elias Bayer in.

Q. Did Elias Bayer come into the room? A. Yes, sir. 1532

Q. Did Colonel Snyder ask Elias Bayer certain questions and did Elias Bayer make certain answers? A. Yes, sir.

Q. Did you reduce those to your notebook in stenographic form? A. Yes, sir.

Q. Will you tell us what Elias Bayer said and what Colonel Snyder said?

Mr. Keenan: The same objection, your Hoonr.

The Court: Same ruling. Go ahead.

A. "Please state your name, address and occupation. A. Elias Bayer, 30 West 21st Street. Thread salesman.

"The witness's rights were explained to him. I 1533
want to explain to you as to your legal rights, that you need not answer a question which may incriminate or degrade you, that anything said may be used against you, but I want to clarify that you need not answer a question which will incriminate or degrade you, but you cannot tell a lie. A. That is right, I understand. The witness was sworn.

"What is your relation to Martin Bayer? A. Uncle.

"What is your relation to Melvin Usdan? A. Uncle.

"Do you know or have you ever met the following named officers: Colonel Vidal, Colonel Jacobson, Major Radovich, Lieutenant Roeser? A. Yes, I have. I knew Radovich when he was a captain.

"Which officer did you meet first? A. I met Lieutenant Roeser and Colonel Vidal.

"Approximately when was that? A. I met in a very casual way. It was in 1943.

"Where did you meet these officers? A. At the Copacabana, a night club in New York.

"When did you first meet Lieutenant-Colonel Jacob-
1535 son? A. About a month after I met Lieutenant Roeser and Colonel Vidal.

"Under what circumstances did you meet him? A. I was introduced to him by Lieutenant Roeser.

"Do you remember what time of the year it was in 1943? A. No, I don't.

"When did you meet Major, then Captain Radovich, and under what circumstances? A. I met Captain Radovich in my apartment. Lieutenant Roeser introduced me to him.

"Where is your apartment? A. It was, I don't have it now, at 122 Central Park South. I got married since and gave up my bachelor quarters.

"Did you at any time accompany any officer or offi-
1536 cers to the I. Buss Company on Fifth Avenue, a uniform concern, for the purpose of selecting uniforms? A. I might have gone up with them, but I did send them up to buy uniforms at wholesale prices.

"Was that approximately on July, 1943? Was it last summer some time, do you think? A. I imagine it was around that time.

"Did you ever buy any uniforms for any Army officer? A. No, I never did.

"Do you know or have you ever heard of Captain Pepper of Mitchel Field, New York? A. No, I don't.

"Did you during the month of November, 1943, go to Goldsboro, North Carolina? A. No.

"Did you at any time make an offer of money or other form of remuneration to any Army officer for the purpose of effecting a transfer for your nephews? A. Definitely not.

"Is there any statement you would care to offer with reference to the matter at hand? A. I can only say I never offered anybody, I never gave anything to anybody for the purpose of effecting any transfers.

"Did you ever offer any money to any Army officer 1538
or civilian for the purpose of any special treatment for your nephews? A. No.

"During the past five months has anyone ever talked to you with reference to the transfer of your nephews? A. Major Hogan from Washington was down here and asked me a few questions.

"Along these same lines? A. Along the same lines.

"I again give you the opportunity to tell me what you really know of this case. From my knowledge of this case you are withholding the truth, and I must warn you of the possible consequences of such an act. A. I still have nothing more to tell you."

Q. That was the end of the interview with Elias Bayer? 1539
A. Yes, sir.

Q. Could you tell us what happened then in the office, if you know? A. Then Sam Bayer came back into the room and asked whether he could have a girl in his office take down the testimony. Colonel Snyder agreed. They brought a girl into the office and I read from my notes and she typed, and I stood at her shoulder as she typed to see that she had it exactly as I have it here.

Q. Did you dictate the statement you had taken from Samuel Bayer to this girl? A. Yes, sir.

Q. Did you dictate the statement you had obtained from Elias Bayer to this girl? A. Yes, sir.

Q. Were Elias Bayer and Samuel Bayer present throughout your dictation of both statements? A. Yes, sir.

Q. And was the girl an employee in that office? A. Yes, sir.

Q. Do you know who it was? A. I took her name. It was Ann Solomon, 659 Ocean Avenue, Brooklyn, New York.

Q. Now, when you were dictating to the stenographer did Samuel Bayer or Elias Bayer at any time make any corrections in their previous statements? A. No, sir.

1541 Mr. Wallace: That is all.

The Court: Do you wish to cross-examine?

Cross-examination by Mr. Keenan.

Q. What is mean by the statement, "Witness not excused"? A. The witness was excused. We excused Samuel Bayer first and then upon reflection, Major—Lieutenant-Colonel Snyder decided to ask him whether he knew a Major Pepper of Mitchel Field.

Q. Did I misunderstand you? I might have. I thought you said first, "Witness not excused" at one time.

The Court: Now excused.

1542 Q. Was it "now excused"? A. "Witness now excused."

Q. Who administered the oath? A. Colonel Snyder.

Q. And do you know if Colonel Snyder has any power to issue oaths to anyone? A. He was appointed investigating officer.

Q. And do you know who Major Hogan was? A. I knew who Major Hogan was, yes, sir.

Q. Who was he? A. He was a representative of the United States Army, from Washington. He is connected with the Inspector General's Department.

Q. Inspector General of the United States Army? A. Yes, sir.

Q. And Colonel Snyder is from what branch of the Army? A. He is Administrative Inspector of the First Fighter Command.

Q. Administrative Inspector? A. Yes, sir.

Q. Is he in the Inspector General's Department, too? A. It is an administrative staff, sir. He is not an I.G.D.

Q. What is I.G.D.? A. Inspector General's Department.

Q. Was any lawyer present representing any of these defendants, either Samuel or Elias Bayer? A. No, sir.

Q. Did Colonel Snyder suggest that it may be wise for these two men to consult counsel? A. Not exactly that, sir. 1544
He asked——

Q. Did he mention the words, getting a lawyer? A. Yes, sir.

Q. What did he say? Is there anything that you have read about that? A. I don't have it in my notes, no, sir.

Q. Why didn't you take that down? A. That was off the record.

Q. Why was it off the record? A. Because at the beginning we asked, before we started taking testimony, Colonel Snyder said to Samuel Bayer he was going to ask him some questions, and if Samuel Bayer wanted to have his lawyer here, he had permission from the Army.

Q. He had permission? A. Not in that way, but it was implied.

Q. It was implied? A. Yes, sir. 1545

Q. Did you take it down, what was said? A. No, sir.

Q. Why not? A. It was not on the record.

Q. Why wasn't it on the record? A. Because we didn't ask questions, I took my notes down——

Q. You only take down on the record questions that are asked? A. I take my instructions from Colonel Snyder, sir.

Q. Well, that might be an answer that was not taken down because you were not told to do that by Colonel Snyder? A. Yes.

Q. Is that the reason it was not on there? A. Yes, sir.

Q. Colonel Snyder, of course, was in his uniform? A. Yes, sir.

Q. And you were? A. Yes, sir.

Q. And that statement was taken when? A. On August 15, 1944.

Q. That is, right in the height of the war period? A. Yes, sir.

1547 Mr. Keenan: That is all.

Cross-examination by Mr. Robb.

Q. How long were you there in all, Sergeant? A. I would say roughly an hour at the most.

Q. How long did it take to take these particular statements? A. About fifteen minutes or twenty minutes.

Q. What went on in the other forty minutes, or forty-five minutes? A. Well, fifteen minutes for Samuel Bayer approximately.

Q. Yes. A. Or twenty minutes, and twenty minutes for Elias Bayer, and the rest of the time was navigating to the car.

Q. How long was it before you started to take these
1548 statements in shorthand? A. Almost immediately, sir.

Q. Can you give us an estimation of minutes? A. I would say roughly ten minutes.

Q. Ten minutes? A. Yes.

Q. Could you tell us what was said in those ten minutes? A. The introductions, and Colonel Snyder's offer to Samuel Bayer to ask his lawyer to come.

Q. That had taken you maybe thirty seconds to tell us. Wasn't there something else that went on? A. Well, when

we came up the elevator we were let out in the corridor, and as we walked to the office Samuel Bayer and Elias Bayer came out, and they both walked into the office in which the interview was, and Colonel Snyder introduced himself most or mainly to Samuel Bayer, and then asked Elias Bayer to leave the room.

Q. Did you have an appointment with the Bayers, Sergeant? A. Did I?

Q. Or did the Colonel, if you know? A. Not that I know of, no, sir.

Q. In other words, you walked in on them more or less unannounced, isn't that it? A. I would say so. I didn't make the plans. I just accompanied Colonel Snyder. 1550

Q. I understand your function perfectly, sir. A. Yes, sir.

Q. Now, can you give us any other conversation that took place before you started to take down this statement? A. I don't believe there was any, sir.

Q. By the way, Sergeant, where is Colonel Snyder? A. Where is he?

Q. Yes, sir. A. The last I knew he was on orders.

Q. On orders? A. Yes, sir.

Q. He is not here today? A. I have not seen him.

Q. You have not seen him in the witness room? A. Oh, no, sir.

Q. Sergeant, before you started to take that statement or these statements, was there anything said by Colonel Snyder about his right to examine these two men at all, his right to examine civilians? A. I would have to reflect upon that. 1551

Q. Would you do that, please, sir? A. If I remember it correctly, sir, we walked into the office, and, just as I said, Colonel Snyder said that he was from the First Air Force, represented the United States Army, in connection with charges pending against Major Radovich. I believe that is about all. He was empowered as investigating officer to investigate the charges.

Q. Yes, sir. He was empowered as an investigating officer by the military to investigate those military charges, isn't that correct, Sergeant? A. I don't know, sir, on that.

Q. He did not have anything to do with any civil charges, did he? A. As far as I know——

Mr. McGohey: We submit the witness has answered that he does not know how extensive his authority was.

The Court: He answered that question. Any further questions?

Q. And your answer is, Sergeant, that you don't recall any discussion about Colonel Snyder's jurisdiction over the 1553 civilians? A. As far as I know, no, sir.

Q. They did not raise the point, so far as you recall? A. No, sir.

Mr. Robb: Will your Honor indulge me just a moment?

The Court: Yes, sir.

Mr. Keenan: One further question, your Honor, if I might ask it.

By Mr. Keenan.

Q. Did Colonel Snyder say anything about where Major Radovich was at the time? A. No, sir.

1554 Q. Or what his status was? A. No, sir.

Q. You are certain of that? A. I am pretty positive, yes, sir.

Q. It was not discussed at all? A. No, sir.

The Court: Is that all?

Mr. McGohey: The Government has no further questions, your Honor.

The Court: You may be excused.

(Witness excused.)

JAMES JOHN HENDERSON, called as a witness on behalf of the Government, being first duly sworn, testified as follows:

Direct examination by Mr. Wallace.

Q. Mr. Henderson, will you keep your voice up so that all the jurors and all counsel can hear you? A. Yes, sir.

Q. Where are you employed, Mr. Henderson? A. First National Bank of Palm Beach, at Palm Beach, Florida.

Q. And in what capacity are you employed at the First National Bank? A. As auditor and assistant comptroller.

Q. Are you familiar with the records of the bank in relation to cashier's checks? A. Yes, sir. 1556

Q. Did the bank have a facility at Morrison Field— A. Yes, sir.

Q. —in 1943? A. Yes, sir.

Q. Now, in the course of the business of the bank, when a cashier's check is issued, is a record kept by the bank as a permanent part of its file? A. Yes, sir.

Mr. Wallace: Your Honor, in this case I would like to have marked the photostat, as I understand the bank wants to keep the original as part of its records.

The Court: Both may be marked.

(Original marked Government's Exhibit 23 for Identification; photostat marked Government's Exhibit 23-A for Identification.) 1557

Q. Now, will you look at Government's Exhibit 23-A and tell me if you recognize that as a part of the record of the bank kept in 1943? A. Yes, I do.

Q. And this photostat marked 23-A, that is a duplicate of 23, is that correct? A. That is correct.

Q. You haven't the original of 23, have you? A. No, sir.

Q. What happens to the original of the cashier's check? A. After it is presented for payment it is cancelled and kept, retained as part of the bank's permanent records.

Q. Was the original of 23 ever cancelled? A. It has never been presented for payment.

Mr. Wallace: I offer in evidence Government's Exhibits 23 and 23-A.

Mr. Robb: We object, if your Honor please.

The Court: Is there objection, gentlemen?

Mr. Robb: Yes, sir, we object to it.

The Court: Let me see them, please. I will overrule the objection and admit the exhibits.

1559 Mr. Robb: Exception, if your Honor please.

The Court: Very well.

Mr. Keenan: May we record an objection, if your Honor please?

The Court: Very well.

Mr. Robb: Would your Honor like me to make a statement as to the grounds of my objection?

The Court: If you wish to.

Mr. Robb: There is no connection shown between that check and this case.

The Court: I assumed that would be your ground, but I will overrule the objection.

You wish to withdraw the original and leave the copy?

1560 Mr. Wallace: That is correct, your Honor.

The Court: Well, in addition to that, I think it may be better to keep both in the court file for the present, and if you wish to do that later you may take it up with me.

Mr. Wallace: All right, your Honor.

Mr. Keenan: Well, I think it can go back. We may want to ask some questions about it, but I think there can be a substitution.

The Court: I would prefer to have the original remain in the case for the present, and if you wish to withdraw it later I will entertain a motion. Have you any further questions for the Government?

Mr. Wallace: Yes, I have, your Honor. I wanted to read the exhibit to the jury at this time.

(Government's Exhibits 23 and 23-A for Identification received in evidence.)

Mr. Keenan: I object to it on the additional grounds, your Honor, that it can't be, if I understand the testimony correctly, can't be the check that was described by Captain Pepper, who was a Government witness, because if my memory serves me correctly he said he tore that check up. 1562

The Court: The witness has testified it is not the original but it is the bank's duplicate and that the original has never been presented to the bank. That is what this gentleman has testified to, so the objection is overruled.

Mr. Ansell: May I have one moment, please, to make a statement, your Honor?

The Court: Yes.

Mr. Ansell: As yet I see nothing to connect any one of these defendants with these documents here, or the documents with the defendants.

The Court: All right. That is the ground which I understand your colleague asserted, sir, and I over- 1563
rule that objection.

Mr. Ansell: Well, he said, "with the case," and I wanted to make it more definite than that.

The Court: I so understood.

I do not believe that you are going to be able to complete the examination of this witness this afternoon, and I think I am gong to recess now unless there is some further reason not to do so. However, from the

looks of the documents that you have on the desk there I do not think you will be able to complete it.

We will adjourn now, ladies and gentlemen, until 10.30 tomorrow morning.

Mr. Wallace: Would your Honor direct the witness to return tomorrow morning, please?

The Court: Yes. You will please be back here tomorrow at 10.30.

The Witness: Yes, sir.

(Adjourned to October 11, 1945, at 10.30 A. M.)

1565

New York, October 11, 1945, 10.30 A. M.

TRIAL RESUMED.

JAMES JOHN HENDERSON, resumed the stand.

Mr. Robb: If the Court please, might I address your Honor briefly?

The Court: Yes, sir.

Mr. Robb: I have read the two statements, one by Samuel Bayer and one by Elias Bayer, which were offered in evidence yesterday and received over our general objection. While, of course, I may say that general objection, since then they have now come into
1566 evidence, and it seems to me they ought to be read to the jury.

The Court: They ought to be what?

Mr. Robb: It seems to me they ought to be read to the jury in their entirety. I have gone over them, and while I find, as your Honor did, there is some chaff in the statements, I do not think there is anything in there which we have any large objection to insofar as the language is concerned, or the particular context

is concerned, although we do, of course, maintain our general objection that we have talked to your Honor about before.

The Court: All right, proceed.

Direct examination (continued) by Mr. Wallace.

Mr. Wallace: I think, your Honor, when we recessed yesterday, Exhibit 23 had been marked in evidence, and I was about to describe it to the jury without passing it around.

Exhibit 23——

The Court: Now I think it would be proper rather than to have a description, to read the document in full. 1568

Mr. Wallace: That is what I intended to do.

The Court: All right.

Mr. Wallace: Exhibit 23 reads as follows:

(Reads Exhibit 23 to the jury.)

Q. Now, Mr. Henderson, in connection with Exhibit 23, that is, cashier's check No. 49896, did you ever receive any correspondence in connection with the original of that cashier's check? A. Yes, sir.

Q. And did the bank maintain a pile of correspondence in relation to that cashier's check? A. Yes, sir.

Q. Will you look at these papers and tell me if you can identify them (handing)? 1569

Mr. Keenan: Are you going to show them to us?

Mr. Wallace: Yes.

The Court: Yes.

A. These papers were taken from the files——

Mr. Robb: Pardon me, just a minute. If the Court please, I think the question could be answered yes or no.

The Court: Yes.

Q. Can you identify them? A. Yes, sir.

Q. What are they?

Mr. Robb: I object to that, if the Court please.

The Court: I will permit him to identify them.

Mr. Keenan: I want an exception noted.

The Court: Very well.

1571 Mr. Robb: The same for us, if the Court please.

The Court: All right.

Q. Without going into any details just tell me generally what those papers constitute. A. These papers constitute the file in connection with cashier's check 49896.

Q. Now, I draw your particular attention to this paper, the bottom. Is that paper part of the file which is maintained by the bank in the regular course of its business in connection with that cashier's check, Exhibit 23? A. Yes.

Q. And was this a letter that the bank received? A. Yes.

Mr. Wallace: I offer in evidence the letter which forms part of this file.

1572 The Court: Show it to counsel.

Mr. Wallace: Yes, sir.

The Court: Or suppose you let me see it first, if you don't mind.

Mr. Wallace: Yes, sir (handing to Court).

The Court: All right. Now show it to counsel.

(Mr. Wallace handed letter to Mr. Robb.)

Mr. Robb: Will you bear with us, if your Honor please, for a moment?

The Court: All right.

Mr. Robb: We object, if the Court please.

The Court: On what ground?

Mr. Robb: Might counsel approach the bench, if the Court please?

(The following proceedings took place at the bench.)

Mr. Robb: If the Court please, we object on two grounds: First, I assume that the only ground for the offer is that this is a business record kept in the usual course of business, and we submit that this is not the kind of record which is contemplated by the Federal Business Record statute as it is made by this bank, it is not a record made by anyone in the course 1574
of the ordinary routine of the bank and it does not come within the scope of the exception to the hearsay rule which is contemplated by the Business Entry statute. It is entirely outside the scope of that statute.

Secondly, if the Court please, this matter purports to be a confessional act on the part of this defendant Radovich, and we think that before any such act or declaration by him is received in evidence we should have the opportunity to explore fully the circumstances under which he was induced to make that confessional act or statement.

On both of those grounds we object to this.

The Court: Objection overruled.

Mr. Robb: May we have an exception, if the Court please. 1575

Mr. Keenan: We object to it on behalf of the Bayers. Obviously, in the first place, the mere fact that if otherwise admissible it would be admitted in the manner and fashion approved under the statute quoted, it does not cure the vice of inadmissibility on other grounds, and it is obvious from the date that whatever happened the Radovich letter happened after he was under arrest, as we think the evidence has and

will show, and that it took place not in furtherance of any conspiracy on its own face; and, secondly, after any alleged conspiracy had terminated.

The Court: What has the Government to say as to the last objection?

Mr. Wallace: On the question as to whether the alleged conspiracy has ended, it is the Government's position that it had not ended. As far as Radovich's participation in the conspiracy is concerned, the Government does not claim that this particular act was in furtherance of the conspiracy and is therefore not admissible against all of the defendants, but only as
1577 against the defendant Radovich.

The Court: Objection overruled. And the letter will be admitted as to Radovich, and I will so inform the jury.

Mr. Robb: Might I say one further thing, if your Honor please?

The Court: Yes.

Mr. Robb: In connection with the second ground of my objection, which was that we should have an opportunity to show the circumstances which induced or produced this letter by Radovich, we offer to prove, if we are permitted, that he was induced to write this letter by promises and coercion held out and imposed upon him by the investigating officers at Mitchel Field, that that is why he wrote this letter which is
1578 now being offered in evidence.

Mr. Keenan: I want to add to our objection. While I understand the Court will instruct the jury that it is not binding upon the defendant Bayer, nevertheless, I think if it is improperly admitted even against Radovich, still it is to the Bayers' disadvantage, and I will add that to my objection.

The Court: What have you to say about the inducement and promises?

Mr. McGohey: There is nothing in that letter to indicate that it was made on any promises.

Mr. Wallace: The letter itself appears to be in the handwriting of the defendant, the entire letter.

Mr. Keenan: Nobody has so stated.

Mr. Wallace: That is for the jury to determine. The jury has before them Exhibit 1, which contains the signature of Walter Radovich. The jury is in a position to determine whether or not that is the signature and writing of Walter Radovich. They ultimately must decide that fact.

Mr. Ansell: We want to press the objection, your Honor, that inasmuch as this serves the purpose of 1580
a confession, that this man Radovich was being subjected to investigation, that he was being promised that he would be let out if he did certain things, that he had been there unlawfully for a certain period of time, and we think that all of those circumstances, that question of inducement and coercion ought to be considered before it is admitted.

Mr. Wallace: The letter is in no sense a confession. It is the Government's position, your Honor——

The Court: I will admit the letter.

Mr. Robb: May we have an exception?

The Court: You may have.

(The following proceedings took place in open court:)

The Court: The objections are overruled and the 1581
letter is admitted. Exceptions noted.

(Marked Government's Exhibit 24.)

The Court: Go ahead.

Mr. Wallace: Your Honor, I would like to read to the jury Government's Exhibit 24.

The Court: You may.

Mr. Keenan: I will ask the Court to instruct the jury before the letter is read.

The Court: I will instruct you, ladies and gentlemen, that the letter purports to be from the defendant Radovich, and I charge you that you may consider it in your consideration of the charge against the defendant Radovich, but you should not consider it as evidence in your consideration of the case as against the two Bayers.

Proceed.

(Mr. Wallace reads Government's Exhibit 24 to the jury.)

1583 Mr. Wallace: We have no further questions.

The Court: Do you wish to cross-examine, Mr. Keenan?

Cross-examination by Mr. Keenan.

Q. Do you know Samuel Bayer or Elias Bayer? A. No, sir.

Q. Does your bank have any account with them at all, that you know of?

The Court: What is the date of that letter?

Mr. Wallace: It is undated, your Honor.

The Court: Pardon me, Mr. Keenan.

Mr. Wallace: Except that at the top of the page it
1584 has "Received 8/26/44."

Q. Does that mean the date that the letter was received was the 26th day of August, 1944? A. Yes, sir.

(Previous question read as follows:)

"Q. Does your bank have any account with them at all, that you know of?"

Q. (Continuing) With Samuel or Elias Bayer? A. I don't know.

Q. Well, did you look up your records before you came up here, to see whether or not they were depositors at your bank or had any account at your bank? A. No, sir.

Q. What? A. No, sir.

Q. Did anybody ask you to do anything like that? A. No, sir.

Q. Did you look up to see whether Walter Radovich had an account in your bank? A. No, sir.

Q. Do you know who purchased the draft referred to, No. 49896? A. No.

Q. You don't know? A. No. 1586

Q. Is there anything you see in any of your records in any manner or fashion relating to either Samuel or Elias Bayer? A. No, sir.

Mr. Keenan: That is all.

Cross-examination by Mr. Robb.

Q. Mr. Henderson, you don't know the defendant, Major Radovich, either, do you, sir? A. No, sir.

Q. Never saw him in your life? A. No, sir.

Q. You don't know his handwriting, of course? A. Only from the letter, I have seen it.

Q. You don't know who wrote the letter, do you? A. No, sir. 1587

Q. Of your own knowledge you don't know who wrote it? A. No, sir.

Mr. Robb: That is all. Thank you.

Redirect examination by Mr. Wallace.

Q. Just a few questions, Mr. Henderson. How long have you worked in the bank? A. Since January, 1939.

Q. And prior to that time what was your occupation? A. I was with the Florida Bank & Trust Company at West Palm Beach.

Q. How long have you in all been in the banking business? A. Since June, 1929.

Q. Have you been a teller, a paying teller and receiving teller? A. Yes, sir.

Q. Have you in the course of your business had occasion to examine signatures on checks? A. Yes, sir.

Q. To determine whether the signature on the check corresponds with the signature on an account card? A. Yes, sir.

1589 Q. Now, I show you Government's Exhibit 1, and direct your attention to a signature which appears on the third page, and which reads "Walter Radovich," and ask you whether in your opinion the signature appearing on Exhibit 1, and the signature appearing on Exhibit 24, were written by the same person?

Mr. Robb: If the Court please, we object. He has not qualified him as an expert.

The Court: I think he has sufficiently qualified him as an expert by reason of his bank experience. I will overrule the objection.

Mr. Robb: Exception.

The Court: Go ahead.

The Witness: In my opinion both signatures were
1590 written by the same person.

Mr. Wallace: I have no further questions.

Recross-examination by Mr. Robb.

Q. One further question, Mr. Henderson. You don't know, of course, the circumstances under which whoever wrote the letter which you have produced wrote it, do you? A. No, sir.

Q. You don't know anything about that? A. No, sir.

Mr. Robb: That is all.

Further cross-examination by Mr. Keenan.

Q. Apparently you know that the letter was written by Walter Radovich while he was in ward 15 of the new confinement hospital at Mitchel Field?

Mr. McGohey: I object to that, your Honor. It appears on the letter itself.

The Court: Objection sustained. Any further questions? Have you further questions?

Mr. Keenan: No, thank you.

Mr. Wallace: Your Honor, the Government would like to substitute for the documents in evidence photostats of them, as Mr. Henderson has indicated that the bank would like to retain them, or retain the original of the document in evidence. 1592

The Court: Why not let Mr. Henderson's bank wait until we get through with this trial? I think I would prefer to have the originals here until the case has been tried. These gentlemen will return the original, Mr. Henderson.

The Witness: All right, sir.

(Witness excused.)

GERALD J. FLYNN, resumed the stand. 1593

Mr. McGohey: May I proceed, your Honor?

The Court: Proceed.

Direct examination continued by Mr. McGohey.

Q. Mr. Flynn, did you see Major Radovich on the 15th day of March of this year, 1945? A. Yes.

Q. And where did you see him? A. I saw him in the office of the Federal Bureau of Investigation in this building.

Q. And on what floor is that? A. That is on the 26th floor.

Q. Was there anybody else present while you were with him? A. Yes, special agent, Edward McCabe was also present.

Q. Now, when Major Radovich——

Mr. Keenan: How is that spelled, please?

Mr. McGohey: M-c-C-a-b-e.

Q. Now, when Major Radovich came to your office was he accompanied by anybody? A. If I recall correctly, he was accompanied by a Major Fabbricatore, who had also
1595 come in to see me that day.

Q. Now, did you have a conversation with Major Radovich that day? A. I did.

Q. Was Major Fabbricatore present during the conversation? A. Well, he was present during part of the conversation, yes.

Q. And Mr. McCabe was present during the conversation? A. Mr. McCabe was present during part of the conversation.

Q. Now, were there any stenographic notes made of that conversation? A. No, sir.

Q. Well, subsequent to the conversation did you reduce to statement form anything that Major Radovich had said to you? A. Yes, I did.

Q. And did Major Radovich read that statement after
1596 it had been written? A. Yes.

Q. Did he make any corrections in it? A. I believe he initialed a correction or an addition on the first page.

Q. Now, did he place his initials on any part of the statement in addition to what you have just described about the correction? A. Yes, he initialed each page of the statement.

Q. Did he sign it? A. And he signed the last page.

Q. Now, was this statement prepared, the written statement, prepared on the 15th of March? A. The preparation

of that statement began on the 15th of March and it had ended a couple of days later, I believe about March 17th.

Q. Well, now, on March 17th did you see Major Radovich? A. Yes, I did.

Q. Where did you see him? A. In our office.

Q. On that day did you have a conversation with him? A. I did.

Q. Was anything he said on that day included in the statement? A. Yes.

Q. And that was the day that he signed the statement? A. That was the day that he read the entire statement and signed it.

Q. And signed it? A. Yes, sir. 1598

Q. Now, will you tell us, as well as you can from your recollection, what Major Radovich said to you on March 15th or on March 17th?

Mr. Robb: If the Court please, we object, and ask that we have an opportunity to explore the circumstances under which these statements were made.

Mr. Keenan: Of course, your Honor, I object to this witness now giving his recollection orally of some statement that he took and that was not taken down in stenographic form at the time, but which he wrote up afterwards and now gives his version, whatever it is. We object to it particularly in light of the previous testimony.

The Court: I overrule that objection. 1599

Mr. Keenan: Exception.

Mr. McGohey: Mark that, will you, please?

The Court: I will have him identify it first and then pass on your objection.

Mr. Robb: Yes, sir.

(Marked Government's Exhibit 25 for Identification.)

Mr. Robb: Will your Honor excuse the jury?

The Court: I will let him identify the statement and then I will excuse the jury.

Mr. Robb: Yes, sir.

Q. Mr. Flynn, will you look at Government's Exhibit 25 for Identification, and tell me is that the statement which you have just told us you wrote down after your conversations with Major Radovich (handing to, witness)? A. Yes.

Q. And Major Radovich signed that in your presence? A. He signed that in my presence.

Q. And this is your signature here, "Gerald J. Flynn" (indicating)? A. Right.

1601

Q. As a witness, is that correct? A. Yes, sir.

Q. And do you see the other signature of Mr. McCabe on there? A. Yes, sir.

Q. And that was made in your presence? A. Yes, sir.

Q. And in the presence of the defendant Radovich? A. Yes, sir.

Q. And your signature was put on there in his presence? A. Yes, sir.

Q. And you saw Major Radovich put his initials at the bottom of each of these pages? A. I did.

Q. Now, who wrote in that correction on the first page there, the fourth line?

Mr. Keenan: Just a minute.

1602

Mr. Robb: If the Court please, we are going too far now in this examination. I think we ought to have an examination first to explore the circumstances before we go into it any further.

Mr. McGohey: If your Honor please, may I be heard?

The Court: Yes.

Mr. McGohey: The witness has testified that Major Radovich made a correction on the first page. I am just identifying it.

The Court: I am going to permit it to be identified and that correction to be asked about.

Q. Is that the correction which you described to us just a few minutes ago? A. That is an addition. I inserted a word there and Major Radovich initialed the insertion.

Q. At that point? A. Yes.

Mr. Keenan: Can I see what he is talking about?

Mr. McGohey: I offer it in evidence, your Honor.

The Court: Ladies and gentlemen, you may retire to your room.

(At this point the jury was excused and the following proceedings took place in the absence of the jury.) 1604

Mr. McGohey: If your Honor please, may I at this time withdraw the question which I asked the witness, to give us his recollection of that statement?

The Court: Very well.

Mr. Keenan: What?

Mr. McGohey: I am withdrawing the question that I asked of the witness.

Mr. Keenan: The record will show a question was asked and objected to, overruled, and passed upon in the presence of the jury.

The Court: And withdrawn.

Mr. Keenan: And withdrawn in the absence of the jury.

The Court: Do you wish the jury here while it is withdrawn? 1605

Mr. Keenan: I do when the time comes, yes, your Honor. I do not want them brought back for that purpose.

The Court: All right. I reserve judgment on that.

Mr. Robb: Your Honor, I wonder if we might have a moment on this statement to look it over. I have

never seen it before. It has just been handed to me by Mr. Wallace and I would like a chance to look at it.

The Court: What do you call a moment?

Mr. Robb: It appears to be fourteen pages long.

The Court: I will give you, of course, any time that is reasonable, but I understood you are now going to explore the matter of the circumstances of the making of the statement.

Mr. Robb: Yes, sir.

The Court: If you wish time to study the statement before doing that, I will grant it to you, but I would not think that it would be absolutely necessary

1607 to familiarize yourself with the contents of the statement.

Mr. Robb: No, sir, because the contents have nothing to do with the circumstances of my inquiry.

The Court: All right.

Preliminary cross-examination by Mr. Robb.

Q. Now, Mr. Flynn, about what time of day was it that you had this first conversation with Major Radovich on March 15th? A. As I recall it, I think it was about the middle of the day when we talked on the first day.

The Court: You are referring to March of this year, are you?

1608 The Witness: March 15th of 1945, yes, sir.

The Court: All right. Go ahead.

Q. And he came direct to your office? A. Yes, sir.

Q. Had you arranged to have him come in? A. Yes, I had an appointment with him. I had asked him to come in.

Q. How did you make that appointment? A. I think I made that appointment with him when he had been in the office on a previous occasion.

Q. He had been in on previous occasions, hadn't he? A. Oh, yes.

Q. How many times? A. Well, he had been in our office, I would say, about four or five times. That is an estimate.

Q. And had you arranged to have him come in on those occasions? A. Yes.

Q. And how did you make those arrangements? A. Either by telling him when he came in on a previous visit, or by calling Mitchel Field.

Q. And who did you call at Mitchel Field? A. Usually I would call a Lieutenant-Colonel Miller.

Q. Who is he? A. He was—I believe his position was at the time assistant judge advocate of the First Fighter 1610
Command.

Q. That was the command to which Major Radovich was attached or under whom he was confined, isn't that right? A. I don't know whether it was a command under whom he was confined or attached at the time. I know that was the command that he was originally attached to.

Q. That is right. And you would tell Colonel Miller you wanted Radovich to come in, is that right? A. I would ask Colonel Miller if he would see if Major Radovich could come to the office on such and such a day.

Q. Well, you would tell him to send Radovich in, wouldn't you? A. No, I don't give commands to the Army.

Q. Well, you would ask him to send Radovich in, wouldn't you? A. I would ask him to have Radovich at the office 1611
on such and such a date.

Q. That is right. And then after you had that conversation Radovich would come to your office, is that right, pursuant to it? A. Not always.

Q. Not always? When didn't he? A. Well, I recall at least one occasion I had telephoned Lieutenant-Colonel Miller and Radovich did not come in, and I had to make a subsequent appointment several days later.

Q. Had you called Colonel Miller back about that to find out why he hadn't come in? A. No.

Q. Why didn't you call Major Radovich direct when you wanted him to come in? A. I tried that on one or two occasions, and I believe Major Radovich gave me his phone number direct, but he was rather difficult to find in the field. He was not always in the same spot.

Q. And that is why you called Miller? A. Yes, that is why I called Miller.

Q. Any other reason? A. No, that is about the only reason.

Q. You knew at that time that Major Radovich had to
1613 receive clearance or permission from his superior before he left the field, didn't you? A. Well, I believe that Major Radovich told me that he merely had to tell them that he was leaving the field, and that he was granted permission.

Q. Now, Mr. Flynn, the statement you took from Major Radovich on March 15, 1945, was not the first statement you had taken from him, was it? A. No.

Q. When had you taken a previous statement? A. I am not quite certain of the exact date, but I believe it was about September 5th or 6th of 1944.

Q. And where did you take that statement? A. I took that statement at Mitchel Field in the Santini Hospital.

Mr. McGohey: If your Honor please, I object to this, because, as I understand this inquiry, it goes to
1614 the question of the voluntary character of the statement offered in evidence. Now we are talking about something that happened six months before. The Government was not offering any statement taken at that time.

Mr. Robb: If the Court please——

The Court: It might have some bearing on the issue.

Q. Now, you had that statement with you when you were talking to Major Radovich on March 15th, hadn't you, Mr. Flynn? By "that statement" I mean the one you had taken out at Mitchel Field. A. I believe it was there; I think it was, yes.

Q. And was the statement that you took at Mitchel Field written out in longhand? A. Yes.

Q. In your handwriting? A. Yes, I wrote that statement.

Q. And that was signed also by Major Radovich? A. That is right.

Q. In fact, Mr. Flynn, you had before you when you talked to the major on March 15th and March 17th the 1616
statement that you had taken from him out at Mitchel Field, didn't you? A. I had it on the desk, yes, sir.

Q. And you more or less followed along that statement, I mean the previous statement, in framing the one you took on March 15th and March 17th, is that correct? A. No, I wouldn't say I followed it. I would say that it was read, that I read it and that Major Radovich, I believe, read it.

Q. I beg your pardon? A. I say Major Radovich read the statement and I read the statement. As I recall it, I got the statement out at the suggestion of Major Radovich.

Q. And he read it and you read it before you took the new statement from him, isn't that right? A. That is right.

Q. What was the purpose of taking the new statement? A. Major Radovich had remembered several additional 1617
pieces of information which I thought important. He had a more complete picture in his mind, and that was the purpose of taking the new statement.

Q. In other words, you wanted to add something to the old one? A. I wanted to incorporate the entire story into one statement.

Q. Expand it a little bit, is that right? A. I didn't intend to expand it——

Mr. McGohey: I suggest the witness has answered it. And I object to counsel putting words in his mouth.

Mr. Robb: I am cross-examining.

The Court: He is cross-examining; the jury is not here.

Q. Mr. Flynn, it is a fair statement, isn't it, that the statements you took at Mitchel Field in September were really the basis of the one you took in your office in March, basically they were the same, weren't they? A. Basically the same—if you want to go right down to the basis, and I will have to wander a bit from your question on this, Major
1619 Radovich told me the story in September. He didn't change that story basically, so the statements would be basically the same.

Q. And you used the September statement as a point of departure in preparing the new statement; isn't that a fair way to put it? A. I don't understand what you mean by that "point of departure."

Q. Perhaps we have covered it already. The new statement was really the old statement with some new facts added to it, isn't that about right? A. No. I would say it was a new statement. It may have been similar, but I say it was a new statement.

Q. You had the old statement on the desk when you were writing out the new one; isn't that true? A. That is true. It was there, as I recall, at the request of Major Radovich.
1620 Q. In other words, he remembered he had a previous statement to you? A. That is right.

Q. And he spoke about it to you, is that right? A. That is right.

Q. You said that when you took the statement in September Major Radovich was in the Santini Hospital. What ward was he in? A. I wouldn't recall the ward. There was no occasion for me to remember it.

Q. Can you give us any description of that ward? A. That is difficult because the Santini Hospital, as I recollect it, has a number of buildings or wings off a connecting corridor, and unless you know the place very intimately you would be lost down there.

Q. Well, you didn't go all over the hospital to see Radovich, did you? A. No, I did not.

Q. Was the ward that he was in locked? A. I don't recall that the ward was locked.

Q. How did you get in? A. I was taken there by a Lieutenant-Colonel Miller.

Q. You had never seen Major Radovich before? A. I had never seen him before.

1622

Q. By the way, did you give us the exact date of that statement? A. I told you I couldn't give you the exact date; that I thought it was about September 5th or 6th of 1944.

Q. Do you recall whether or not that ward had bars or grilles on the window? A. No, I don't recall it. I noticed that there was a screen there, I believe, but I don't know—

Q. Where? Screen where? A. On the window.

Q. What kind of screen? A. It would be an ordinary type of screen, to keep insects out.

Q. It was not a heavy wire? A. I don't recall that it was a heavy one. I paid no particular attention to it.

Q. You don't recall what kind of screen it was? A. I say, I paid no particular attention to it. I think there was a screen there.

1623

Q. When you say "there", where do you mean? A. Where we are talking about.

Q. On the windows? A. On the window.

Q. Window— A. Of Major Radovich's room.

Q. Do you recall you had to go through a locked gate to get into this ward? A. I think there was a gate there.

Q. Was it locked? A. I don't recall that, whether it was locked or not. Major—Lieutenant-Colonel Miller pre-

ceded me into the ward. Now, whether he had to have the gate opened or not, I don't know.

Q. Did Colonel Miller introduce you to Radovich? A. He did.

Q. What did he say when he introduced you? A. Well, my recollection is that he told Radovich that I and Special Agent Brown——

Q. Was Brown with you? A. Brown was with me at the time.

—were special agents of the Federal Bureau of Investigation, that we wanted to talk to him about this matter, and that it was up to him whether he wanted to tell us any-

1625 thing.

Q. What else did he say? A. I believe then he asked me if I thought I could find my way out without his coming back for me, and that is all.

Q. All right. Then what happened? A. Lieutenant-Colonel Miller left.

Q. Now, Mr. Flynn, at that time you were interviewing Major Radovich as a witness, weren't you? A. I was interviewing Major Radovich for the purpose of obtaining the story. I did not classify him as a witness or anything else.

Q. What was said by you or by Brown after Colonel Miller left? A. We discussed the case in general, and then——

Q. What do you mean by that? A. Well, the facts of

1626 the case. Do you want me to go into the discussion?

Q. I want to know how you opened up the interview with Major Radovich at that time. A. I told him that the Federal Bureau of Investigation was conducting an investigation into this matter and that we had come to him to get his story as to just what happened.

Q. All right. What was said then? A. He told me the story.

Q. All right. Was there any hesitation on his part? A. None at all.

Q. Do you recall him making a telephone call about that time or trying to make a telephone call? A. I recall that he mentioned a warrant officer by the name of Bradspies; I don't know whether that is right or not.

Q. That is all you recall about it? A. And that—I don't know whether he attempted to call him or not. Several times, as I recall it, Major Radovich would go out into the hall and either answer phone calls or make them. I did not accompany him out.

Q. Do you recall any conversation about whether or not you were interested in the military side of the case? A. 1628
No.

Q. That was not mentioned? A. I don't recall that at the time.

Q. Would you say that didn't take place? A. That I was interested in the military?

Q. Do you recall any conversation about whether or not you and Mr. Brown were concerned with the military side of the case or whether you were only interested in the apprehension and prosecution of the civilians who may be involved? A. No, I don't recall that.

Q. Would you say that didn't take place? A. I say, I don't recall it.

Q. But you wouldn't say it didn't take place? A. If I don't recall it I would say it didn't take place. I think 1629
I would recall a statement like that.

Q. You don't recall what kind of ward it was, do you? A. I don't see that there is any reason why I should pay attention to the type of ward. I go into a lot of rooms and buildings during the course of my work. There is no particular reason to describe those rooms afterwards.

Q. You don't take statements from witnesses every time you go into one, though, do you? A. I take statements from a great number of people.

Q. Do you know how long Major Radovich had been in that ward when you talked to him? A. No.

Q. Did you find out? A. No.

Q. Weren't you interested? A. No.

Q. You know, do you not, that if a man has been confined for longer than a reasonable time without being arraigned or brought before a commissioner, any statement he makes can be used against him; you know that, don't you?

Mr. McGohey: I object to that, your Honor. That is a question of law.

1631 The Court: That is a legal question.

Mr. Robb: I am merely trying to find out if there wasn't some reason for this witness to be interested in how long Major Radovich had been in there.

The Court: He said he wasn't and he didn't know. It has no bearing.

Q. Did you ever have any conversation with Major Radovich as to whether or not he was going to be tried over here in the District Court? A. I never had any occasion to discuss that with Major Radovich.

Q. I didn't ask you that, Mr. Flynn. I asked whether you did have any such conversation. A. No.

Q. Are you sure about that? A. Yes.

Q. Never heard any conversation about that? A. No.

1632 Q. Never heard anybody speak to him about that? A. No.

Q. Never heard him asked whether he was going to be tried with the civilians? A. No. I don't recall ever hearing that mentioned.

Q. Would you say it wasn't mentioned? A. I will say I don't recall it.

Q. Did you ever hear Major Radovich ask you or anybody else whether he was going to be indicted or tried along with the civilians in the case?

Mr. McGohey: If your Honor please, I think the time ought to be fixed about this, if it is material at all.

The Court: Well, he is asking him, comprehensively, if he heard it. I think that is all right. We can go into more detail, if he requires it at all.

A. I never—he never asked me that. There is no reason for him to ask me that. I have no——

Q. Did you ever hear him ask anybody else that? A. I don't recall that I ever heard him ask anybody else that question.

Q. Did you ever hear anybody tell him that he was not going to be tried along with the civilians or in the civilian 1634
court? A. No, I never did hear anybody tell him that.

Q. You never heard that? A. No.

Q. Did you ever hear anybody tell Radovich that the District Attorney's office was not interested in Army people but was only interested in prosecuting the civilians? A. I don't recall hearing anybody tell him that.

Q. Were you present when the major was interviewed by Mr. Wallace on several occasions? A. I think I was present on some of the occasions, but not all of them. There was an occasion, I believe, when you were present; I wasn't there.

Q. Were any of those occasions prior to your interview, which you told us about, on March 15th? A. You mean prior to the taking of this statement?

Q. Yes, sir. A. I would say yes, that possibly they 1635
were.

Q. In other words, there were occasions when the major came in to see Mr. Wallace and those were other than the occasions when he came in to see you; is that right? A. That is right.

Q. Did you arrange to have him come in to see Mr. Wallace? A. I may have.

Q. Well, did you? A. On some occasions I believe I did.

Q. Did you do that by calling Lieutenant-Colonel Miller? A. My usual method was to call Lieutenant-Colonel Miller unless I had been in contact with Major Radovich.

Q. Let me ask you, Mr. Flynn, why did you go to see Lieutenant-Colonel Miller on the first occasion when you went to see Radovich in the hospital? Why did you go to see Miller before you went to see Radovich? A. I didn't know where Radovich was.

Q. Why did you pick on Colonel Miller as the one to see? A. Well, Miller is the judge advocate or the assistant, the then assistant judge advocate of the First Fighter Com-
1637 mand, and I believe the case had been brought to our attention through the Office of the Judge Advocate of the First Fighter Command.

Q. Through Colonel Miller? A. It was not brought to my attention through Colonel Miller; it was brought to my attention by the office of the United States Attorney.

Q. Yes. But you said it was brought to "our attention". A. It was brought, as I understand it, and I have no knowledge of this, of my own knowledge, it was brought by Colonel Harmeling.

Q. Who is Colonel Harmeling? A. He is Judge Advocate or was the Judge Advocate at that time.

Q. Colonel Miller's superior? A. Yes.

Q. In other words, the case was referred to the United States Attorney by Colonel Harmeling, who was Colonel
1638 Miller's superior; right? A. That is what I understand.

Q. And then you were assigned to investigate it, is that right? A. That is right.

Q. How long had you been on the case when you went out to see Radovich the first time? A. Several days.

Q. Well, could you give us about how many days? A. I would estimate it would be about three or four days.

Q. He was not the first witness you interviewed?

The Court: Aren't you getting off the subject, Mr. Robb?

Mr. Robb: Perhaps I am, your Honor. May I have that question answered, then I will go on to another one.

The Court: Yes, sir.

A. That would be hard to say at the moment. I don't recall if he was the first one.

Q. Mr. Flynn, isn't it a fact that when you interviewed Major Radovich in that hospital that you didn't consider him to be a prospective defendant in your case, the case you were trying to make? 1640

Mr. McGohey: I object to that, your Honor.

The Court: I think we can consider that as immaterial, what he considered then. I suppose that is different from what we are considering. I am stretching pretty far in my consideration that statement, because the March statement is the thing that we are concerned with, isn't it?

Mr. Robb: That is all true.

The Court: I understand that there might be some connection——

Mr. McGohey: Certainly not the answer to that last question, your Honor.

The Court: I say, I don't think that question is proper. It is the reaction in the declarant's mind that 1641 is important, or what he had a right to have in mind,

Mr. Ansell: If the Court please, I admit Mr. Robb can take care of himself, but there is a point that I think has not been sufficiently brought out so far. It does not seem to me to be important upon any examination to show the capacity in which this witness was approaching and examining Radovich. I think it is important to show what this witness did.

The Court: So do I, and I am letting him testify fully about what he did and said.

Mr. Ansell: I thought it would be important, if your Honor please, to know in what capacity the witness approached Radovich, whether as a defendant or as a mere witness. I am speaking, your Honor, about the necessity of taking a defendant, if he is a defendant, before a duly authorized committing magistrate. It might be different if he were a mere witness. But here was a man, so far, in a very small room Mr. Brown calls it, and I thought it would be important and enlightening—it will have to be brought out some day or
1643 other—as to the relationship of this investigating witness to Radovich at that time, whether he was out there examining Radovich as a defendant or as a mere witness. I think it makes a big difference.

The Court: I don't see how he could possibly tell what his status would be until after he completed his investigation. He testified he went out there as an investigator and declared himself as such. What took place from there on I will permit you to go into.

Mr. Ansell: He saw he was in confinement, your Honor, already; whether held by the civil authorities or held by the Army, he was in confinement.

The Court: Let us complete the examination about the facts and then I will hear you. Have you further questions?

1644 Mr. Robb: Yes, I have.

The Court: Go ahead.

Q. Now, Mr. Flynn, how large was this room in which you found Radovich at the hospital? A. I think that fact can be readily ascertained from the records, but my estimate would be it was possibly, oh, 10 or 12 feet square, with a lavatory attached to it.

Q. 10 or 12 feet square? A. 10 or 12, I mean "by" 12; I don't mean 10 square feet now.

Q. I know what you mean. And how was it furnished? A. Well, my recollection is that there was a bed in there, a small table, and I believe two chairs.

Q. Straight back chairs? A. I don't recall that.

Q. Do you recall any conversation with the defendant Radovich on the occasion you went there the first time to the hospital about whether or not he was being stupid if he didn't talk to you? A. No.

Q. You don't recall that? A. No.

Q. You said that Radovich left the room a couple of times, and you thought, to make a telephone call? A. Yes. 1646

Q. Did he tell you what he was going to call about? A. Well, as I said before, the name of Bradspies was mentioned. Now, whether he was talking to Bradspies or whether he received a call from Bradspies I don't recall.

Q. You don't know what he wanted to talk to Bradspies about? A. I think at that time that Bradspies was assigned to Radovich as counsel.

Q. How do you know that? A. I think Radovich told me that.

Q. All right. Would you answer my question, do you know what Radovich wanted to talk to Bradspies about? A. No, I don't recall that I know that.

Q. Don't you know, Mr. Flynn, that Radovich was worried about whether or not you were interested in prosecuting him and he wanted to assure himself about that before 1647 he talked to you? A. No. As a matter of fact, I know that he wasn't.

Q. He wasn't worried, is that right? A. That is right.

Q. Why wasn't he worried? A. Well, I can tell you what he told me.

Q. Go ahead. A. He told me that he regretted very much getting mixed up into this affair and wanted to get it all straightened out, and that in view of that fact that he

had returned as much money as he then had to the Army, he had turned over a certain—I don't recall the sum of money that he said he had turned over at that time, but he had turned over some money.

Q. That is why he wasn't worried about being prosecuted by the District Attorney's office? A. No. The reason that he apparently didn't impress me as being worried by that was the fact that he stated that he——

Mr. Keenan: I object to anything going in this record as what impressed this man about Major Radovich being worried.

1649 The Court: All right. Just tell what he said.

A. (Continuing) Well, he said that he regretted getting mixed up into this affair.

Q. Yes, you told us that. Now I want to know what there was about him which led you to conclude that he was not worried about being prosecuted? A. He didn't mention it.

Q. It wasn't anything you mentioned to him, was it? A. No, it was definitely nothing that I mentioned to him.

Q. Did you again see the major out at Mitchel Field after this first interview in the hospital? A. I don't recall that I ever saw him in the hospital again.

Q. I didn't ask you that. Did you again see him at Mitchel Field? Did you not say "in the hospital"?

Q. No, sir.

1650

Mr. Wallace: Let us have the question read back.

The Court: Oh, don't let us quibble, gentlemen.

A. If I misunderstood you, I am sorry.

The Court: Go right ahead.

A. (Continuing) I saw the major at Mitchel Field again.

Q. Where? A. I went out there to see a Captain Kogan one day. This was quite some time later. And Major Radovich heard that I was there and rode over on a bicycle to see me.

Q. Where did you see him? A. I saw him in the front of the temporary building in which the Judge Advocate's office was.

Q. Colonel Miller's office? A. Colonel Miller and Colonel Harmeling.

Q. Do you recall ever having any conversation with Major Radovich about whether or not the District Attorney's office was in sympathy with him? A. No, I wouldn't make—I did not and I would not make such a statement. 1652
That would be for the District Attorney to make.

Q. Did you ever hear anybody say that to Major Radovich? A. No.

Q. Now, on the occasion when you told us that you saw Major Radovich the second time at Mitchel Field, you did not have him sent over to the office to see you? A. No, I did not even know he was coming. In fact, I did not intend to see him that day.

Q. Now, Mr. Flynn, getting back for a moment to your interview with the major on March 15th, you told us you read his statement which he had made in the hospital in September; did you read it aloud? A. I don't recall whether I read it aloud. I recall that I read it and that I gave it to Major Radovich, and that he read it.

Q. You read it first? A. Well, I can't be positive whether 1653
I read it first or whether he read it.

Q. How many pages were in that statement?

Mr. McGohey: Pardon me. Which statement?

Q. The statement that you had taken in September and which you read. A. Maybe five or six.

Q. Did you have a copy of it with you? A. No.
Q. Is there a copy here? A. I don't know.

Mr. Robb: Mr. McGohey, do you have a copy?
Mr. McGohey: Yes, I have.
Mr. Robb: May I have it, sir?
Mr. McGohey: It is in the office. I answered the question that I have it. That is true. I have possession of that statement, your Honor, but I certainly am going to resist producing it now unless directed, because I am not offering that statement in evidence.
The Court: I will not require you to produce it.

1655 Mr. Robb: If the Court please, may we formally ask the Court to require Mr. McGohey to produce it, and take an exception to your Honor's ruling?
The Court: Very well.

Q. Mr. Flynn, how long had you been in that hospital room before you began to take down this statement from Radovich? A. I couldn't estimate; it wasn't too long. I got there some time in the middle of the afternoon. I would say maybe about 15 or 20 minutes, maybe a little longer. That is purely an estimate.
Q. Had one of these telephone calls that you told us about taken place before you began taking the statement down? A. I don't recall that.
Q. You don't recall whether it had or not? A. I don't
1656 recall whether it was before I started to write the statement or whether it was in the middle of the statement.
Q. Mr. Flynn, could you give us your best judgment as to what time of day it was that you went there to see Radovich?

Mr. McGohey: I think he has answered that, your Honor.

Mr. Robb: I want to see if he can give it a little more accurately.

A. Well, it was probably half-past two or three o'clock.

Q. In the afternoon? A. Yes.

Q. You knew, did you not, that at that time Major Radovich was confined?

Mr. McGohey: I think that question has been answered at least twice, your Honor.

The Court: I will let him answer it a third time.

A. I don't know that he was confined. I had nothing to do with any confinement. He was not in my custody. 1658

Mr. Keenan: Your Honor, I object and ask that this witness be instructed to answer the question of counsel.

The Court: Well, I think he has answered.

Q. Your answer is that you didn't know whether he was or not? A. I have no—of my own knowledge I don't know that he was confined.

Q. Did somebody come to take him out for a walk while you were there? A. No. I don't recall that. I am sure I would recall it if it happened.

Q. Do you recall whether at that time he was getting ready to go out for some exercise? A. No, I do not recall that. 1659

Q. Do you recall any conversation about some decorations he was wearing? A. Yes. I recall that there was some officer, I don't recall his rank, who came there with a letter to Major Radovich regarding the wearing of decorations in the hospital—I don't recall, I didn't see the letter. But it was apparently some reason why some officer there thought he shouldn't wear his decorations, and Radovich, as I recall it, just refused to take them off.

Q. At that time, Mr. Flynn, how was Major Radovich dressed—uniform? A. Oh, yes.

Mr. Robb: That is all for the time being, if the Court please.

The Court: All right. Have you other testimony?

Mr. Robb: Yes.

Mr. Keenan: I would like to ask a question of this witness at this time, your Honor.

The Court: All right, sir.

By Mr. Keenan.

1661 Q. Did you show Major Radovich the testimony, the statement you got from Bayer? Look at me.

Mr. McGohey: I object, your Honor.

The Court: I don't think you have any right——

Mr. Keenan: I think I have a right to interrogate this witness as to anything that is germane to the issues of this case.

The Court: I am not saying that. My point is that I don't think you have a right to direct the posture and the cast of his countenance.

Mr. Keenan: I beg your pardon. It was my own observation.

The Court: I am going to let you examine the wit-

1662 ness.

Mr. Keenan: May I have the question answered?

Mr. McGohey: Your Honor, may I be heard for a minute, please?

The Court: On what?

Mr. McGohey: I object to any examination here by Mr. Keenan: Your Honor has already instructed in

all of these matters that these statements were to be admitted only as against the person who made them. Now the question that we are going into, as I understand it now, is whether or not this statement made by Major Radovich is voluntary or not.

The Court: That may technically be true, but I am going to let counsel examine the witness if I think it is material.

Q. Answer the question, please. Did you show the statements taken from the two Bayers to Major Radovich? A. No.

Q. They had been written out beforehand? A. Which— 1664
you mean at any occasion——

The Court: Do you think that has any bearing on the admissibility of the statement, Mr. Keenan?

Q. Did you discuss the fact with him of what Bayer had stated?

Mr. McGohey: I object to that, your Honor. That is immaterial.

The Court: I don't see any bearing on the admissibility at all.

Mr. Keenan: I think I have the right, your Honor, to interrogate this witness as to any material fact in this case at this time in cross-examination. 1665

The Court: All I am saying now is the question of whether this is a voluntary, admissible statement.

Mr. Keenan: Oh, I beg your pardon. I won't go into it.

The Court: All right, sir.

Mr. Robb: If the Court please, I have one question I would like to ask the witness.

By Mr. Robb.

Q. Mr. Flynn, you were receiving, were you not, copies of statements taken by the Army investigators in connection with this case?

Mr. McGohey: May I have that question?

The Court: Had he been receiving copies of statements taken by Army officers.

Q. (Read.) A. I received copies which had been taken from the United States Attorney. I did not receive any copies of statements which were being taken or any copies—

1667

Mr. Ansell: I can't hear him.

(Answer read.)

A. (Continuing) —which were being taken by the Army investigative officers or any copies subsequent to the receipt of those original copies which I received from the United States Attorney's office.

Q. Now, the statements you had received from the United States Attorney's office were those which had been taken previously by Army investigators, is that right? A. That is right.

Q. The Army investigators turned over their statements to the United States Attorney, who in turn gave them to

1668 you, is that right? A. That is right.

Q. And you had those when you went out to interview Major Radovich at the hospital, isn't that right? A. No, I don't believe I had those statements with me that day.

Q. Well, I mean you had them in the files? A. They were in the office, I believe.

Q. And your office and the Army investigators were working together in this case, weren't they, co-operating at least? A. We were co-operating; we were not working together, though.

Q. Well, that is why I changed the expression. You were co-operating, weren't you? A. Well, I agree with your change then.

Mr. Robb: That is all.

The Court: All right, sir. You may step aside. Call the next witness.

Mr. McGohey: I have a few more questions I would like to ask of this witness, your Honor.

The Court: All right.

Redirect examination by Mr. McGohey.

Q. Now, the first time you saw Major Radovich was some time in the early part of September, was it not, at Mitchel Field? A. 1944? 1670

Q. That is, September of 1944? A. Yes.

Q. Now, between that time and the 15th of March had you had any communication with Major Radovich? A. Oh, yes.

Q. Did you have any telephone conversations with him? A. Oh, yes, he called me on the phone.

Q. He called you on the phone? A. Yes.

Q. At your office here? A. Yes.

Q. And in those telephone conversations did he make any statements to you that had a bearing on this case?

Mr. Robb: If the Court please, I submit these questions are very leading, and I object to them. 1671

The Court: Well, I do not find that. Some of them may be, but then he may be in a position to cross-examine him. I do not suppose he is. However, I do not think that the questions are very leading.

Mr. McGohey: Well, your Honor——

The Court: No. Go ahead.

Mr. McGohey: Read the question, please.

The Witness: Yes. On one occasion I recall that he called me to give me the correct name of the uniform company. He had been in error as to the name.

Q. Now, you stated that Major Radovich came to your office on March 15th, and I think you testified also that on some other occasions when you wanted to see Major Radovich you would call Colonel Miller? A. That is right.

Q. And ask him to send word to the Major? A. Yes.

Q. Now, was there any occasion between September, 1944, and March, 1945, when Major Radovich came to your office without having had an appointment made by a telephone conversation?

1673 A. I believe he came in one day unexpectedly. I don't recall that we did anything except talk for a few moments and——

Q. At least he came into your office? A. Yes. And there was a second occasion when he called me up and told me that he wanted to see me, and when he came into the office, why, he had no reason to see me. He wanted to just pick up a jacket, I think, which he was having tailored.

Q. Now, on any of the occasions that Major Radovich came into your office, was he accompanied by any guard? A. No, I never recall Major Radovich coming into our office under a guard.

Q. Now, by whom was he accompanied at any time? A. On most of the occasions he was not accompanied. I believe on one, or on at least one occasion he came in with a

1674 Major Fabbricatore, when they both drove in together.

Q. Well, you told us about that before? A. Yes.

Q. Now, was he ever accompanied by anybody else? A. No. He would sometimes come in in a staff car, and he would tell me that there was a chauffeur waiting for him downstairs. I believe that is all.

Q. Well, when he came into your office, I mean was he accompanied by anybody, except the day that he was accompanied by Fabbricatore? A. No.

Q. And when he left your office was he accompanied by anybody? A. No.

Q. Now, when you took the first statement from him, you told him that you were an agent of the Federal Bureau of Investigation. Did you tell him the consequences of any statement that he might make? A. I told him that, and I identified myself as an agent of the Federal Bureau of Investigation. I told him briefly that anything that he did say could be used against him.

I told him that I was in no position to make any promises to him either one way or the other, and that if I were to make such a promise I would not be able to keep it because I had no such authority. 1676

Q. And did you ever make such a promise? A. I never made him any promises.

Q. At any time? A. At any time.

Mr. McGohey: I have no further questions.

The Court: All right.

Recross-examination by Mr. Robb.

Q. Who brought up the subject of making any promise, you or Major Radovich? A. I beg your pardon?

Q. Who opened up the subject of whether or not you could make any promises, you or Major Radovich? A. I did in telling him just what my position was.

Q. He had not asked for any promises? A. No. 1677

Q. You opened that up yourself? A. I made the statement. I always make that statement.

Q. Is that why you say you made it to him, or do you remember making this particular statement? A. No, I recall specifically I made that statement to him.

Q. You remember this particular case, is that right? A. I recall it.

The Court: Any further questions of this witness?

Mr. Robb: No, sir.

The Court: All right. Call the next witness.

Mr. Robb: If the Court please, might this witness be instructed not to discuss this testimony with anybody, I mean, Mr. Flynn?

Mr. McGohey: If your Honor please, Mr. Flynn is the agent that I have been having at this trial all the way through. He has been in charge of the investigation, and I would prefer to have him sit right here.

The Court: Well, I would prefer not to have him sit there during the course of his testimony. While
1679 You are on the witness stand, Mr. Flynn, as I told you before, I do not want you to discuss this case with anyone. When the testimony is completed or when Mr. Flynn has completed his testimony as to the Bayer statements, I told him he might resume his place at the counsel table. So, he may not resume his place there until after he has completed his testimony here.

Mr. McGohey: All right, sir.

WILLIAM JOSEPH PENDER, called as a witness on behalf of the defendant Radovich, being duly sworn, testified as follows:

1680 *Direct examination by Mr. Ansell.*

Q. Mr. Pender, will you tell me where you are employed now? A. I am stationed at Mitchel Field Fire Department, Mitchel Field, Long Island.

Q. How long have you been employed at Mitchel Field? A. At the present time, four months, sir.

Q. Were you ever employed as a wardman in the Santini Hospital at Mitchel Field? A. I was.

Q. Were you employed as a wardman in this hospital in August and September, 1944? A. I was.

Q. Will you please state to the Court the duties of your employment in that hospital? A. I will, sir.

Q. Please state what were your duties. A. My duties—

Mr. McGohey: I object to that, your Honor. I do not see its materiality to this question.

The Court: I suppose you are going to connect it?

Mr. Ansell: Certainly.

The Court: I would like you to connect it as directly as it is logical.

Mr. Ansell: Yes, sir. 1682

Q. Did you see or know Major Radovich in the hospital in August and September, 1944? A. I did.

Q. Did you have any duty with respect to Major Radovich at that time, August and September, 1944? A. I did.

Q. You were a wardman there? A. Yes, sir.

Q. You were there as a wardman, and do you remember when Major Radovich was brought into that hospital? A. I do.

Q. Do you remember about what time of the day and what month it was when he was brought there? A. I do.

Q. When? A. It was around the 8th or 9th of August, around 5:30 at night, on either one of those days, the 8th or 9th of August.

He was assigned over to me to take care of him, to undress him, relieve him of all property that he may have on his possession, such as razor blades, matches, fountain pens, tooth brush, whatever article may injure him. 1683

He was to take a bath, and then I gave him pajamas, coat and pants, pajamas without strings to tie up the pants, and a bathrobe without a string to tie around his waist.

I then assigned him to a room and watched him until my tour of duty was over.

Q. Will you tell me who brought Major Radovich into that ward? A. At the time he was entered in the ward and brought inside the gate, a nurse put him inside the gate, whoever was at this time the nurse, and he just transferred over to me.

Q. You did not see any officers bring him there? A. No, sir.

Q. Who was the nurse? Was it a nurse of rank in charge of that ward? A. It was a nurse of rank in charge of that ward.

Q. What was her rank? A. First Lieutenant.

Q. First Lieutenant? A. Yes, sir.

1685 Q. You say he was roomed in ward 15? A. That is right, sir.

Q. Will you describe to me what ward 15 of that hospital was? A. Ward 15, it was composed of twenty-four beds. One section of the ward had six beds on one side and seven on the other, rooms, and as you entered the ward you had to pass through a big iron gate and as you stepped inside the gate you were assigned to rooms on both sides of the ward.

Q. This iron gate then was the door or gate to ward 15, is that right? A. That is right, sir.

Q. And when you got into ward 15 there were little rooms, were there? A. Yes, sir, there were little rooms with doors attached, and inside of those was a bed about 6 foot long. The room was composed of about 6 by 9, and

1686 the windows in that room were screened with heavy mesh about a half an inch, and were locked by key at all times.

Q. By screens, do you mean an ordinary screen against insects, or was it a screen of steel grill? A. It was of steel grill.

Q. What about the door that entered into this ward? What kind of door was it? A. That was a big, heavy door weighing about 250 pounds, 200 pounds.

Q. And was that grilled, too? A. That door was solid except two leaves; one at about 5 foot high and the other about 12 inches from the floor.

Q. And there was a lock and key? A. Yes, sir.

Q. To that door? A. That is right, sir.

Q. A heavy door with a heavy lock and key, is that right? A. That's right, sir.

Q. Where was the key to that door kept? A. That was kept on the person of the attendant.

Q. And you had been an attendant? A. Yes, sir.

Q. Would you have that key? A. Yes, sir.

Q. Now, as you entered this ward 15 and went to one of the small rooms, as the room where Radovich was confined, 1688
will you state again for me the size of Radovich's room? A. Radovich's room was 6 by 9 with a heavy gate door, and on the side there was an adjoining bath. Now, this is only just one room I am talking about with adjoining bath, a bathroom.

Q. What kind of bed? A. The bed was an iron bed.

Q. Then, as I understand it, you entered this ward through a door, of course. What did that door consist of? A. A big, heavy iron gate.

Q. Did that have a lock and key, that door? A. That door did have a lock and key.

Mr. McGohey: I think we have been through this, your Honor. 1689

The Court: It seems to me you are repeating.

Mr. McGohey: It has all been described in great detail.

Mr. Ansell: Your Honor, we want to describe this in great detail.

Mr. McGohey: We have had it.

The Court: Possibly we have had enough on that.

Q. Well, was there a lock on the door that entered this small room where Radovich was confined? A. There was a lock on that door.

The Court: He has already so testified, and that the attendant carried the key.

Mr. Ansell: That was offered as to the big door.

The Court: As to the iron door I understood him to testify.

Q. You are familiar with the purposes and use made of ward 15, are you? A. Yes, sir.

1691 Q. What were the purposes and use made of ward 15? A. To see that no patient committed suicide while being detained there.

It was mostly for battle fatigue, nervous patients, acute alcoholics, or alcoholics.

Q. Well, it was a place where people who were violent or likely to commit suicide were kept, is that right? A. That's right, sir.

Q. And it was for that reason that you took away Radovich's uniform, presumably? A. Yes.

Q. And took away his shaving facilities? A. That's right, sir.

Q. And gave him pajamas without a belt? A. That is right, sir.

Q. A hospital robe without a belt? A. That is right.

1692 Q. Now, what kind of supervision did you keep over Radovich, or were you instructed to keep over him? A. The nurse in charge gave me strict orders "suicide", and on suicide we keep these doors wide open and watch him continually for the twelve hours we are on duty to see that he does not harm or hurt himself in any way.

Q. And you were on twelve hours and then there would be another wardman or attendant for different hours, is that right? A. There would be.

Q. When Radovich would want to shave, how would he shave? A. I would have to step through the iron gate and open a lock and get his briefcase, or whatever may be there, and take his razor out, and insert a blade, and bring him over to the bathroom and watch him while he was shaving.

Q. And then when he had finished shaving? A. I would take the razor right off him and put it back, lock it up again.

Q. How did he get his meals and how were they served? A. His meals were served on a tin platter, with no knife, only a fork and spoon and cup, no glass.

Q. Did he always have a fork and spoon with which to eat his meals? A. Yes, but with somebody watching him. 1694

Q. Did the time ever come when he was deprived of the fork even? A. Yes, he was deprived even of the fork. An order came through to take all forks away.

The Court: You mean all the forks in the ward?

The Witness: In the ward, yes, sir.

Q. Did you take away Radovich's fork? A. Yes, sir.

Q. Do you remember, or have you any recollection of a day when an Army officer and some civilians came there and visited that ward apparently for the purpose of examining Radovich? A. Yes, sir.

Q. Do you know who they were? A. I don't know who they were, sir.

Q. Do you know the rank of the officer who came? A. 1695
At the time I think he was a Lieutenant Colonel.

Q. You wouldn't know and couldn't identify now the civilians? A. No, sir, I couldn't.

Q. They were all together? A. That is right.

Q. About what time of day was that, if you recall it? A. As I recall it, it was around 12:45 or 1 o'clock at that time.

Q. Why do you recall it as of that particular time? A. On account of the dinner hour was over in the ward.

Q. Do you remember whether Radovich upon this particular occasion and time was in a uniform or not? A. He was in uniform that day.

Q. Why do you know that? A. He was going to be taken out for a walk.

Q. Who took him out for a walk? A. Some corporal from the M.P.'s office.

Q. Was he taken out for a walk daily? A. When they seen fit to send a man up to him; that is the only time.

Q. Was that a regular time, or fixed hour each day when he was to be taken out for a walk? A. Generally when the sergeant of the guards could let a man come up to take
1697 him out; very, very rare.

Q. When Radovich was first confined in this ward was he permitted to go for a walk, do you remember? A. No, sir.

Q. How long did that continue when he was not permitted to go out at all? A. It was eight to ten days.

Q. How long did these walks last? A. The walks lasted to my estimation about half an hour, three-quarters of an hour.

Q. And then the corporal, or whoever it was, the military party that took him out, brought him back? A. That is right.

Q. And his uniform was again taken off? A. That is right.

Q. What did you do with his uniform? A. This uniform was locked up at all times.

1698 Q. If a patient had money in it, or keepsakes, or what-not, what was done with those? A. The nurse in charge of those would relieve him of all money or property, whatever he may have on him at the time.

Q. I would like to get a more accurate description of this room that Radovich was in. Was it brick, or concrete, or what? A. It was concrete with a rough finish on it.

Q. Do you know who was then Corporal or Sergeant Kelly? A. No, sir, I did not know who he was. I don't know him.

Q. You don't know him? A. No.

Q. You were in the Army at that time? A. Yes, sir, I was.

Q. How long had you been in the Army at that time? A. Fourteen months, sir.

Q. You are not in the Army now? A. No, sir.

Q. But you are employed at Mitchel Field? A. I am, sir.

Q. Do you know, or can you infer why it was that you were assigned to duty over in this ward 15 as an attendant there? A. I held a job at Kings Park Day Hospital, working around these patients, insane patients, and when I was admitted to the Army I looked for that job right off, and I was assigned to ward 15 after four months. 1700

Q. You do not know whether upon your card they put previous experience over the insane? A. No, sir.

Q. But, in any event, you were assigned to this job of taking care of the insane? A. I was, sir.

Q. Were the occupants in this ward at the same time that Radovich was there violently insane? Were any or many of them violently insane?

Mr. McGohey: I object to that, your Honor. There is not any——

The Court: Objection sustained. I do not think that is material.

Mr. Ansell: It does not give a picture of what Radovich's situation was, your Honor?

The Court: Well, talking about other people, or taking other people in, I do not see that that has any bearing on it at all. 1701

Mr. Ansell: Right next door to him, your Honor?

The Court: I sustain the objection.

Q. Do you know whether Radovich had means of communicating with the outside or not by telephone or otherwise? A. When a patient was admitted to that ward he

is denied telephone privileges. He is not allowed to do any telephoning whatsoever until further orders, and that might be two weeks, or a month, or whenever they see fit to give him the chance to call, or do whatever he wants.

Q. Was a patient in this ward permitted visitors? A. The patients in the ward, yes, they were.

Q. Was Radovich permitted visitors? A. To my understanding, no, until somebody gave authority to visit him.

Q. Who could give that authority, so far as you know? A. As far as I know, it was up to the provost marshal.

Q. How about the mail coming in and going out? A. All mail was censored in and out.

1703 Q. So far as you recall, was there anybody who saw Radovich while he was in there other than Army officers in apparent authority? A. About eight to two weeks, eight days or two weeks, a Colonel and two civilians came in and we admitted them to the room.

Q. You don't— A. After that I don't know what happened in that room on account of the young man was on his own after that time. He had not started to commit suicide, or anything like that, and we left him on his own then.

Q. Did you see any visitors in there after this first eight or ten days? A. No, not that I can recall.

Q. Did you yourself see any evidence of insanity in Radovich?

1704 Mr. McGohey: I object to that, your Honor.

The Court: I will let him answer.

A. No, sir.

Q. Did you see any abnormal conduct of any kind, or anything that indicated he needed restraint? A. No, sir.

Q. Might I ask you whether as you observed Radovich he appeared to be fretful, or otherwise? A. At the time he was admitted, he was fretful and crying, and he was com-

plaining about he wanted to use the telephone to get in touch with the outside world and, of course, that could not be granted to him.

Q. Did he mention whom he wanted to get in touch with in the outside warld and for what purpose? A. He wanted to get in touch with his wife and see if he could talk to her, and, of course, that privilege was denied.

Q. Did he ever mention anything about wanting to get in touch with an attorney? A. Yes, he said he wanted to get in touch with an attorney, but he wasn't allowed to use the telephone.

Q. Were the inmates of this ward 15 mental cases? A. Yes, sir. 1706

The Court: Do you mean that Major Radovich was never allowed to telephone?

The Witness: Sir, they are not allowed to use the telephone.

The Court: For the first week or twelve days?

The Witness: Yes, sir.

Q. Well, after that, so far as you know, going into the question of telephones, what use did he have of the telephone? Could that telephone reach outside of the post, or did he have to get military authority to phone outside of the post?

Mr. McGohey: I object to that question. 1707

Mr. Ansell: Oh, your Honor, I think——

The Court: I will let him answer it. All right.

A. To my estimation, he only could call on the post.

Q. I did not get that, Mr. Pender. A. The only privilege he had was to use the telephone of the post. There were no outside calls made.

Q. On the post? A. That is the only place to my estimation.

Mr. McGohey: Now, your Honor, I move that that be stricken out because the witness says in his estimation. I thought we were going to get a fact.

Q. You mean as you knew the means whereby Radovich and other patients there could communicate outside of *this hospital* post, on your experience, is that right? A. Other patients were not allowed to use the telephone.

Q. And Radovich was no exception? A. He was no exception after eight or ten days or two weeks, whatever
1709 it may have been.

Q. I want to know whether Radovich after this eight or ten days had to get the authority of anybody to communicate by telephone with anybody on the post. A. He had to get permission from the captain of the ward to use the telephone, and whatever went on outside of the gate we don't know on account that we were inside of the gate at all times.

Q. You do know that they had to get permission of the captain of the ward? A. That is right, sir.

Q. An Army officer? A. An Army officer.

Q. A doctor? A. A doctor in the ward.

Q. Do you know whether he could after this eight or ten days communicate by telephone off the post? A. No.
1710

Mr. McGohey: Does that answer mean he does not know whether he could, or that he couldn't communicate? I am not clear on that.

The Witness: I do not know whether he could communicate off the post.

Q. You don't know whether he could or not? A. I could not say.

The Court: Any other questions?

Mr. Ansell: One moment, your Honor.

Mr. McGohey: Are you finished, General?

Mr. Ansell: One moment.

The Court: I beg your pardon. I thought you had finished.

Mr. Ansell: I probably am, sir. I just wanted to go over it in my mind. All right.

The Court: Have you any cross-examination?

Mr. McGohey: Just one or two questions, if your Honor please.

Cross-examination by Mr. McGohey. 1712

Q. How long was Major Radovich in that ward, if you know, sir? A. To the best of my ability, he was there five—five or six weeks, sir.

Q. And were you there all the time that he was there? A. At the time I was in the Army I was there on day shift and night shift, sir.

Q. Now you say your best estimate is that he was there about five or six weeks, as I understood you? A. That is right.

Q. And these five or six weeks commenced, I think you said, about August 8th or 9th, is that correct? A. That is right, sir.

Q. So that some time by the end of September, anyhow, he would have been out of that ward? A. That is right. 1713

Q. According to your estimate? A. Yes, sir.

Mr. Ansell: I do not know if you want to make any point of it, but it would not be the end of September, probably, but that is all right.

Mr. McGohey: Well, the witness——

The Court: No, go ahead.

Q. Now, I understood you to say that on this day when an officer and two civilians came to visit Major Radovich, that you brought them to this room that he was in and then you left them alone? A. That is right.

Q. The expression you used, I think, was that he was on his own? A. He was on his own.

Q. He was on his own? A. Yes.

Q. Did that mean, in your opinion, at that time, that there was not any danger of him committing suicide? A. That is right.

Q. Or otherwise destroying himself? A. Yes.

Q. You thought that he was perfectly all right at that
1715 time? A. That is right, sir.

Q. And could be trusted? A. Yes, sir.

Mr. McGohey: I have no further questions.

The Court: All right, you may be excused.

Have you other testimony, gentlemen?

Mr. Ansell: Yes, sir. Mr. Kelly, if you please.

Mr. McGohey: Judge, might be have a short recess here?

The Court: All right. Ten minutes.

(Short recess.)

VINCENT JOSEPH KELLY, called as a witness on behalf
1716 of the defendant Radovich, being first duly sworn, testified as follows:

Direct examination by Mr. Ansell.

Q. Sergeant Kelly, what is your position now, your employment? A. I am a detective in the Nassau County Police Department.

Q. You were until recently in the Army of the United States? A. Yes, sir.

Q. And before you came into the Army, what had been your position or employment? A. Detective in Nassau County Police Department.

Q. You have gone back then to the same job— A. Yes.

Q. That you had before? A. Yes, sir, I have.

Q. While you were in the Army did you serve at Mitchel Field? A. Yes, sir, I did.

Q. Were you serving at Mitchel Field in the months of August and September, 1944? A. Yes, sir, I did.

Q. In connection with what office were your duties during those months? A. I was an investigator in the Provost-Marshal's office on the field.

Q. An investigator of the Provost-Marshal's office? A. 1718
Yes, sir.

Q. Did you come in contact or come to know in the months of August and September, 1944, Major Radovich? A. Yes, sir, I did.

Q. Where was Major Radovich when you came to know him? A. He was at the psychopathic ward in Santini Hospital.

Q. Is that commonly called in the Army the "nut" ward? A. Yes, sir, it is known in the Army as the "nut" ward.

Q. You in dignified language call it a psychopathic ward? A. Yes, sir, that is right.

Q. In what connection did your duties have to do with Major Radovich? A. Sir, I was assigned by the Provost Marshal to take Major Radovich out for exercise every 1719
day for the duration of about an hour, and——

Q. Do you know when you first came to perform that duty of taking Major Radovich out for exercise? A. No, sir, I don't have the exact date; I couldn't recall it.

Q. You do not know how long Major Radovich had been in ward 15 at that time? A. I recall; about two weeks, he had been in there before I arrived.

Q. Did you have or did you not have a regular time for taking Major Radovich out to walk? A. Well, the time

was set, but I only—my instructions were to take him out when I had the time to take him out, when my duties would permit me to take him out,

Q. Did your duties permit you to take him out every day, do you remember? A. No, sir. There were days that I missed, that I was unable to get over there to take him out.

Q. Were you able, the days that you did take him out, to go there and take him out at a fixed hour? A. No, sir; the time varied. Some days it would be one or two, other days it might be three o'clock in the afternoon.

Q. When you took him out, you were in uniform, of
1721 course? A. Yes, sir, I was.

Q. A Sergeant; armed? A. Yes, sir.

Q. Where did you go? In the immediate neighborhood of the hospital or elsewhere? A. Yes, sir, we stayed within the confines of the post, of Santini.

Q. Did you see anything in any way abnormal with Major Radovich, mentally, I mean? A. No, sir, I did not.

Q. Do you remember when you came in to take him out would you enter the ward and get him from there, or was he turned over to you outside of the ward? A. No, sir. When I would arrive at the hospital I would leave my gun outside. There was an iron gate there. They would admit me through the gate, and I would go down to the Major's room, and sometimes he would be dressed and other times I would have to wait for him to dress, and then we would
1722 leave together.

Q. And he would have to get his uniform, to get dressed, from an attendant, do you know that? A. Yes, sir, on a couple of occasions. The first few times I went there he would have to get his clothing and from then on, after that, he was usually dressed when I arrived, waiting for me.

Q. Would you have given him, usually, a prior notice that you were coming? A. Not always. Sometimes I did.

I would call up and say I was on my way over. I would tell the hospital nurse on duty.

Q. Had you known anything about this ward 15, this psychopathic ward, prior to the time that you came in contact as a matter of duty with Major Radovich? A. Well, only that it was a ward for mental patients. That is all I knew of it.

Q. You had never been in there before? A. I don't believe I was, no, sir.

Q. I would like a description of the very room in which Major Radovich was confined. Will you give it?

Mr. McGohey: Your Honor—— 1724

The Court: Wouldn't that be just repetition, General? The other man, the previous witness, has described it fully.

Mr. Ansell: Well, you remember, your Honor, that we had a witness for the Government testifying it was 12 by 12 feet.

The Court: He said 10 by 12.

Mr. Ansell: 10 by 12. We have my witnesses testifying, and what I believe to be the fact, that it was 6 by 9.

The Court: Would that be determinative of whether it was 6 by 9 or 10 by 12?

Mr. Ansell: I didn't get what your Honor said.

The Court: I say, would that be determinative of the issue before me, whether it was 6 by 9? 1725

Mr. Ansell: I think it would be highly informative, because I regard this as a cell, such a cell as you would find in any place for the insane or jail for the insane. I think it makes a big difference whether a room is 10 by 12 or whether it is 9 by 5 or 6. However, if your Honor regards that that is not a matter in dispute—

The Court: I think it has been fully described, but I am willing to take your description of it, I mean your witness' description of it, your previous witness.

Q. When you were taking Major Radovich out for exercise, what was his attitude, one of complaining or otherwise? A. Well, sir, he was complaining about being confined and he was complaining about not having counsel assigned to him to look out for his interests.

Q. You were a member of the Provost-Marshal's office, in general police charge of a garrison. Do you know whether or not a person in this ward had telephonic access to anybody on the post? A. No, sir, I don't believe he
1727 would. Inside the ward they had no access to phones. The phones were outside, in the office of the attending nurse, outside the gate where the lockup was.

Q. Do you know anything about the Provost-Marshal's orders about that? A. Yes, sir. The orders were the Major could not make any calls and he couldn't visit and have visitors.

Q. Did you make any suggestion to him when he was complaining about not having any counsel, of the name of anybody who might serve to assist him as counsel? A. The Major mentioned that a Mr. Bradspies, to me, who worked on boards and in court, and he said he knew him and would like to see him to get some advice, and he asked me if I would transmit that to my superior, who was Major
1728 Anthony.

Q. The Provost-Marshal? A. Yes, sir, the Provost-Marshal. I advised Major Anthony that Major Radovich desired counsel and would like to see Mr. Bradspies, also that he be released, if possible, to the confines of the base. I believe Major Anthony called his superior officer, and Mr. Bradspies was notified to go over and interview the Major.

Q. Do you remember about when it was that Radovich was released from this particular psychopathic ward 15? A. My recollection is that may be two or three weeks from the time I made my first visit to take him out for an airing.

Q. Did you make any report to the Provost-Marshal with respect to the release of Radovich? A. I conveyed Major Radovich's request to Major Anthony, and he carried it on from there. Who he spoke to or who he saw I don't know.

Q. You say you didn't go over there daily? A. Sir?

Q. You didn't go over there daily to take Radovich out for exercise? A. I did miss; some days I did miss, I was unable to get over there because of other duties which would prevent me from going over. 1730

Q. Could Radovich, so far as you know, have attended mass on Sundays if he had wanted to? A. I doubt that very much.

Q. If he had gone, he would have had to go under you or somebody else in a similar position? A. Yes, sir, that is right.

Q. With a gun strapped on you? A. Yes, sir.

Q. There was one episode that I wanted to question you about.

Mr. Ansell: My notes do not show, if your Honor please.

The Court: All right. 1731

Q. Do you remember, Sergeant Kelly, an occasion when Radovich was confined in ward 15 when some question arose about his decorations, some order having been given that he had to be deprived of them? A. Yes, sir. Our office, meaning the Provost Marshal's office, had orders to tell Major Radovich to remove his decorations. The order was in writing. And a Lieutenant La Plante went over to the hospital—in fact I drove him over, and we both went

into the ward and Lieutenant La Plante advised Major Radovich that he would have to remove his decorations. The Major was quite upset about it and Lieutenant La Plante said he was sorry, he felt very bad about having to do it, but that was his order. The Major was supposed to sign that order and he refused to do so. And Lieutenant La Plante returned to the office, we both returned, and he advised Major Anthony and I believe Major Anthony himself went over some time later. I did not go with him.

Q. You did not go with Anthony? A. No, sir, I did not.

Q. Did Radovich take off his decorations? A. No, sir, he did not.

1733 Q. At that particular time do you recall whether or not there was an Army officer and a civilian, or two civilians, in there at that time; do you remember? A. Yes, sir, there were two men from the F.B.I. department in there.

Q. Was there an Army officer there? A. I did not observe him, no, sir.

Q. But on this very occasion there were two F.B.I. men there? A. Yes, sir.

Q. On the very occasion that Radovich got the order to take off his decorations and turn them in; is that right? A. That is right.

Q. And he refused to do it? A. Yes, sir.

Mr. Ansell: Your witness, Mr. McGohey.

The Court: Have you any questions, Mr. McGohey?

1734

Cross-examination by Mr. McGohey.

Q. Detective, you told us that you in compliance with Major Radovich's request conveyed to your superior, the Provost Marshal, the Major's request to have counsel assigned? A. That is right, sir.

Q. And the name of Mr. Bradspies came up? A. Yes, sir.

Q. That was the man that Major Radovich had asked to see? A. Yes, sir.

Q. Then I think you said that some time later Bradspies did see him? A. Yes, sir.

Q. Do you know when that was? A. I am sorry, I can't give you the exact date. It wasn't too long after, though.

Q. Sir? A. It wasn't too long after, as I remember.

Q. Could you fix that a little more definitely? Would it be a day or two after?

Mr. Keenan: I object.

The Court: Objection overruled. Go ahead.

1736

A. It might have been two days, three days. It wasn't long. My recollection is that it wasn't too long after that.

Q. Now, can you tell us whether Mr. Bradspies' seeing Major Radovich occurred before this day when you came over with the officer who had the orders about the decorations? A. I believe it was, yes, sir.

Q. Bradspies had seen him before that day? A. I believe so, yes.

Q. And that is the day that you saw the two F.B.I. men in the room with Major Radovich? A. Yes, sir.

Q. And Major Radovich was in uniform that day, was he not? A. Yes, sir, he was fully dressed.

Q. And had his decorations on his blouse? A. Yes, sir, he did.

1737

Mr. McGohey: No further questions.

Mr. Ansell: One moment, your Honor.

Redirect examination by Mr. Ansell.

Q. At the time that you saw the two F.B.I. men there, and La Plante, from the Provost Marshal General's office, had come with the orders about decorations, was that the

hour that had been appointed by you to take Radovich out for exercise? A. No, sir. I had been there earlier to take the Major out and he advised me that there were two men from the F.B.I. there that wanted to talk to him, that he would not be able to go out with me that day for his exercise.

Q. But he was in uniform, ready to go out, but was prevented from going out with you by the fact that the F.B.I. men were there, is that right? A. Yes sir.

Mr. Ansell: Nothing further.

Mr. McGohey: Just one question, Detective.

1739 *Recross-examination by Mr. McGohey.*

Q. You answered yes to that last question from General Ansell to the effect that the Major was prevented from going out because the F.B.I. men were there. You didn't mean, did you, that he was physically prevented by the F.B.I. agents from leaving the room? A. No, sir. I didn't mean that.

Mr. McGohey: I have no further questions.

The Court: All right, sir. You may be excused. Have you further testimony, gentlemen?

Mr. Robb: Yes, sir, we have some further testimony, if your Honor please.

1740 The Court: All right, sir. I have a matter during lunch hour which is going to require me to take an hour and a half rather than an hour and a quarter. I am sorry, but it just so happens. I will have to take a recess now until 2.30.

(Recess until 2.30 P. M.)

AFTERNOON SESSION.

(The jury was present in the courtroom.)

The Court: All right, Mr. McGohey.

Mr. McGohey: May it please the Court, just before the jury was excused I had asked the witness to explain a question, to tell us the conversation that he had with Major Radovich. I request now permission to withdraw that question.

The Court: Is there objection, gentlemen?

Mr. Keenan: I believe the record shows that we objected to the question and the objection was overruled. Now the United States Attorney is asking to withdraw it. 1742

The Court: All right. It may be withdrawn.

Now, ladies and gentlemen of the jury, I have been hearing discussion of a legal question which I have not been able to fully hear as yet, and there is more to be heard, and it seems a useless imposition upon you to keep you any longer this afternoon because there will be very little time left for further evidence after I finish the task which immediately confronts me.

I am satisfied that one lady on the jury would not object to leaving a little early—she has already sent me word that she is a registrar and would like to be free to attend to her duties as such. And, as I stated the first of the week, tomorrow being Columbus Day, there will be no session of the court, and the same is true of Saturday, so when I excuse you now you may be excused until 10.30 1743 Monday morning.

And, repeating to you briefly my admonition not to discuss the case nor to permit anyone to discuss it with you, I am going to excuse you until 10.30 Monday morning.

(The jury retired from the courtroom and the following proceedings were had in the absence of the jury:)

The Court: Have you further evidence, gentlemen?

Mr. Ansell: Yes, your Honor. I hardly know where I am now.

The Court: Well, you have just concluded with the witness Kelly.

Mr. Ansell: Yes. Well, we will go into the records now in order to prove certain facts that I wish your Honor would take judicial notice of, particularly the 70th Article of War, because upon that we shall to a certain extent rely.

The Court: I will be glad if you will read it to me.

Mr. Ansell: Yes, sir. I am going to hand it up to your Honor. It is a long article, but I will point out the part of it which is at the very base of our objection to the
1745 admission of these statements as confessions:

> "When any person subject to military law is placed in arrest or confinement immediate steps will be taken to try that person accused, or to dismiss the charge and release him. Any officer who is responsible for unnecessary delays in investigating or carrying the case to a final conclusion shall be punished as a court-martial may direct.
>
> When a person is held for trial by a general court-martial the commanding officer within eight days after the accused is arrested or confined, if practicable, shall forward charges to the officer exercising the general court-martial jurisdiction and furnish the accused a copy of such charges."

1746

I think probably that that is about all of that article which may be pertinent here.

The Court: Might I keep the book over the week-end?

Mr. Ansell: Oh, certainly, your Honor.

Now, our purpose here is to attempt to show as briefly as we can and with as little reference to the records as we can, the charges, the date when the charges were preferred; that is, signed by an officer under other articles

of war, when the accused was confined, and when those charges were referred for trial.

We have here in the hope of releiving us from going into other records what is known as a charge sheet, and the report of the staff command judge advocate, all required by the articles of war, and all of which was required by the articles of war 111th, I think, to be given to the accused.

I have these documents here. They were furnished to us by the trial judge advocate in obedience to that article of war, and of course they are authentic if I am telling the truth about it, which I suppose will not be questioned.

Mr. McGohey: It certainly will not, General. 1748

Mr. Ansell: Thank you, sir. Thank you.

Mr. McGohey: What is the purpose of it? What are you offering it for, General?

Mr. Ansell: The purpose is to show without going through a lot of records when the charges were preferred, when this accused was confined, when the charges were served on him and when he was tried.

Mr. McGohey: Do you want to specify those dates?

Mr. Ansell: That will be perfectly satisfactory.

Mr. McGohey: We can probably agree on those dates, your Honor.

Mr. Ansell: I think I will give you the dates, then.

Mr. McGohey: Yes, suppose you do that.

Mr. Ansell: There is one other thing, Mr. McGohey. 1749
I am not saying anything about it myself, but I feel fairness requires me to call your attention to this statement as the reason for the ten months' delay between the preferring of the charges and the trial (indicating).

Mr. McGohey: Yes, I see that.

Mr. Ansell: I set that out.

Mr. McGohey: It is being offered as a statement that was made and I won't question the fact that somebody made that statement on there.

Mr. Ansell: That is right.

Mr. McGohey: But there are some parts that I will confess, your Honor, as being accurate. I do not concede the truth of the statement; I will concede that it was made.

Mr. Ansell: That is satisfactory.

The Court: All right. As I understand it, the documents are not to be intended as general evidence, but as evidence of this particular issue?

Mr. Ansell: That is quite correct, your Honor.

In a word, I am applying to the situation here, as your Honor of course perceives, the principal rules established by the McNab case and the Anderson case; McNab v. United
1751 States, 318 U. S. 332, and Anderson v. The United States, in 318 U. S. at 350, the last authoritative expression upon the subject which I think is directly involved here.

The Court: I had perceived the direction you were headed, sir.

Mr. Ansell: I have never had any doubt about that, sir.

The Court: And I am not unfamiliar with the McNab case.

Mr. Ansell: I had no doubt about that.

The Court: Go ahead, sir.

Mr. Ansell: Probably now we could specify the dates, because Mr. McGohey would not say there was anything wrong about the dates. There is a statement made on the charge sheet as to the truth of which Mr. McGohey might
1752 dispute. So I would ask Mr. McGohey after he has examined this official charge sheet, furnished to us in accordance with the articles of war, whether it is agreed that the charges against Radovich were preferred August 10, 1944?

Mr. McGohey: Your Honor, I do not know what a charge sheet's function is in Army court-martial procedure. In other words, I don't know whether that constitutes the preferring of a charge or not. I will admit that there is a charge sheet here giving the name of the accused as Major Walter Radovich, then listing a lot of names and

specifying some charges, and that that is dated the 10th of August, 1944. I don't know whether it was served on the defendant at that time or not. 1753

You mean that is the date, then, that the charge was made?

Mr. Ansell: That is the date the charge was signed by Colonel Stewart.

Mr. McGohey: Oh, that I will stipulate, sir, I will agree to.

Mr. Ansell: The 10th of August, 1944, the charges were signed and authenticated and became charges.

Mr. McGohey: Yes. I will stipulate that, your Honor.

The Court: August 10, 1944. Do you wish to proffer the documents which you had in your hand, or is the stipulation which has just been agreed to sufficient? 1754

Mr. Ansell: I should think that should be sufficient. That is established.

Now, next we have the record of court-martial furnished us officially, Mr. McGohey, showing that the charges were referred for trial and served on this accused by the first endorsement on those charges, and that endorsement is dated 29 May, 1945.

Mr. McGohey: Yes.

The Court: What happened on that date?

Mr. Ansell: The charges were referred for trial to the trial judge advocate and served on the accused, so that all this (indicating paper) was given to the accused.

Mr. McGohey: That does not appear in the document, but if you say that is when it was served on him, General, I will accept that. 1755

Mr. Ansell: That is right.

Mr. McGohey: That is on May 29.

Mr. Ansell: We have certain administrative terms here: "Preferred," for instance, means, as I have always understood it, that the charges are framed and some proper person signed the charges. That is called "Preferred."

The Court: Do I understand that on August 10, 1944, charges were preferred and served upon the defendant?

Mr. Ansell: No, sir. The charges were preferred—we are not saying now what happened to them, the accused knows nothing about it, but they were preferred and they are here (indicating). Then later, ten months later, those charges were referred under date of 29 May, 1945, to a trial judge advocate for trial by court-martial that had been appointed for that purpose. That is the first endorsement on these charges. They were served May 29, 1945.

Mr. McGohey: The point I make, your Honor, is that, as I read this charge-sheet, all this first endorsement shows
1757 is that on May 29, 1945, they were referred to Major Harry V. Osborne, Jr., Judge Advocate General's department, Trial Judge Advocate, court-martial appointed by paragraph 13 of Special Orders, and so on, but I don't see anything in there to indicate that they were served on the defendant on that day. I don't know when they were served on the defendant.

Mr. Ansell: Well, I think Mr. McGohey is justified in making that observation. Under the regulations of the Court-Martial Manual, which Congress authorized the President to make so long as not inconsistent with statute, it requires that when a general court-martial is convened for the trial of an officer or enlisted man, the charges are referred to the trial judge advocate who is to prosecute the man at that trial, and he will serve a copy of these
1758 charges on that accused.

The Court: What is the provision if any, applicable to service of the charges as preferred?

Mr. Ansell: Nothing, sir. Under the article, your Honor will observe, they are to be referred immediately, referred immediately for trial. But when they are referred to trial a copy of them—when a court has been appointed and these charges are referred to that court-martial, to a trial judge

advocate, the trial judge advocate is required to serve a copy of these charges on the accused, and not before that. The trial judge advocate knows nothing about it before then. It is a way of acquainting the accused with the nature or cause of the accusation and telling him to get ready for trial.

Mr. McGohey: My only point is, I don't know whether there is anything wrong about it or not, but all I say is I have no way of knowing when they were served.

Mr. Rudykoff: What is the physical fact? When were they served?

Mr. Robb: May 29th.

Mr. McGohey: Do you make the representation that 1760
that is when they were served?

Mr. Ansell: Yes.

Mr. McGohey: If you do make that representation, I will accept your word.

Mr. Ansell: Of course I would not want you to accept my word as the law and the gospel on the subject, but the first endorsement here is a reference to the trial judge advocate for trial.

Mr. McGohey: Your Honor, I have tried to make myself clear. The record does not indicate when they were served. Now, if General Ansell knows as a fact that they were served on May 29th, or whatever day he knows that they were served as a fact, and he states that, I will accept his statement of what he knows to be true, without the necessity of calling anybody to prove it formally. 1761

Mr. Ansell: Of course that is necessarily true; and then later the court convenes.

Mr. McGohey: Maybe we have it here in the court-martial proceeding.

Mr. Robb: If the Court please, this might help us. I find in the court-martial proceeding, official court-martial record, a statement by the trial judge advocate, Major Harry V. Osborne, Jr., "The charges were served on the 30th day of May, 1945."

Mr. McGohey: I will stipulate to that date, your Honor.

The Court: All right.

Mr. Ansell: Now, on this same charge sheet, Mr. McGohey, there is this bottom line (showing). Now, I have exhibited to Mr. McGohey an official statement on that charge sheet required to be made, which is as follows: "Data as to restraint of accused." That is in print. And then "Confined"—typewritten—"at Army Air Base, Mitchel Field, New York, 1850"—that is the hour—"9 August, 1944." And that followed, the Court and Mr. McGohey, please, by a typewritten statement, doubtless written at another time, "Release from confinement by Commanding
1763 General on 2 January, 1945."

If Mr. McGohey would stipulate with me, we might save a lot of time, perhaps.

It is true, Mr. McGohey, that that statement, though, that we are making, "Released from confinement by the Commanding General on the 2nd of January, 1945," is not correct, because the confinement in this case started on the 10th of August and ended the 17th or 18th of September.

Mr. McGohey: Well, I will stipulate that the confinement began on the 9th or 10th of August and ended on the 18th or 19th of September.

Mr. Ansell: That is right.

Mr. McGohey: And that is your claim?

Mr. Ansell: Yes, and that is right.

Mr. McGohey: 1944.

1764 Mr. Ansell: 1944. Now, then, this officer was no longer confined, but he was in arrest and restricted to the limits of the post until this court-martial began.

Mr. McGohey: Well, I do not think that is what the statement says.

Mr. Ansell: No. I told you that this statement is wrong.

Mr. McGohey: No.

Mr. Ansell: He was not in that hospital.

1765

Mr. McGohey: Oh, I see written in here in pencil, "Released from restraint 2 Jan. 45."

Mr. Ansell: I say we have put the pencil notations in here for our own information. That is not on the official sheet.

Mr. McGohey: Well, then, your Honor——

Mr. Ansell: However, we could go into it.

Mr. McGohey: I would like to know who did put that on here.

Mr. Ansell: Well, I don't know, but we could go into this. The Commanding General says that this man was in confinement, and the only confinement he was in, your Honor, was in this ward 15.

1766

Mr. McGohey: Well, may I be heard for a minute?

The Court: Yes.

Mr. McGohey: May I have that a minute, General?

Mr. Ansell: Certainly (handing).

Mr. McGohey: Second line from the bottom has printed "Data as to the restraint of accused." Now, this whole document that I am holding in my hand is a carbon copy of another document, and there appears on the same line with the line "Data as to restraint of accused" these words in carbon, "Confined at Army Air Base, Mitchel Field, New York." And then down on the next line, "1850 9 August, 1944." That is all in carbon.

Now, then, in what is apparently ribbon type, appear these words, "Released from confinement by Commanding General on 2 Jan., 1945." Then a pencil seems to have been run through those figures, and above them appears, "18 Sept., 1945."

1767

Mr. Robb: That, I think, is my handwriting, Mr. McGohey.

Mr. McGohey: Very well. And then below that, in pencil writing, these words, "Released from restraint 2 Jan., 1945."

Mr. Ansell: I would say, your Honor, that inasmuch as I know that counsel can get into colloquies about those things, we will actually get the records here and find out about it. I know what the facts are but I do not want to impose that upon either the Court or Mr. McGohey.

Mr. McGohey: Now, your Honor, I understand that the General concedes that the defendant Radovich was released from confinement on September 18 or September 17, 1945.

The Court: The 18th or 19th, I think.

Mr. McGohey: 1944, rather.

Mr. Ansell: That is the truth.

Mr. McGohey: Yes. I will stipulate to that, your Honor.

1769 Now I would like to ask the General what further fact he wants to offer for me to stipulate to.

The Court: That he was restrained at the post until and 2nd of January, 1945.

Mr. Ansell: Yes, and much longer. And I think in order that we may clear up his status here, and I do not want too much trust put into me about the matter, we will call an officer here, and I think without great delay, Mr. McGohey, and just ask him the dates as shown by the records.

Mr. McGohey: Have we the records?

Mr. Ansell: Yes.

Mr. McGohey: Go ahead and call him.

The Court: What officer?

Mr. Ansell: Captain Fritchley.

The Court: Please call him.

1770 Mr. Ansell: I think I would rather have him myself, your Honor.

RICHARD G. FRITCHLEY, called as a witness on behalf of the defendant Radovich, being first duly sworn, testified as follows:

Direct examination by Mr. Ansell.

Q. Captain, among your records there have you a communication dated August 10, 1944, on the subject of the confinement of Major Radovich, addressed by the Chief of Staff of the Commanding General at Mitchel Field to the Commanding Officer at Mitchel Field? A. Yes, sir.

Q. Have you got that, sir? A. Yes, sir, I have.

Q. May I ask you to read that to his Honor? A. (Reading). "Subject: Confinement of Major Walter V. Radovich. 0416891. Air Corps to Commanding Officer, Army Air Base, Mitchel Field, New York. 1772

"1. On 9 August, 1944, Commanding General directed that the above named officer be confined at your base pending trial by general court-martial for violation of the 95th and 96th Articles of War.

"2. The Commanding General directs that Major Radovich be kept in confinement until further orders.

"Charles H. Caldwell, Brigadier General, G.S.C., Chief of Staff."

Q. Now, Captain, have you among your records there upon the same subject, that is, the confinement of Major W. V. Radovich, a communication from the Commanding Officer of the Base to the Commanding General of the First Air Force? A. Yes, sir, I have. 1773

Q. Will you please read that to the Court? A. (Reading) "Headquarters Army Air Base, Mitchel Field, New York. 16 September, 1944.

"Subject: Confinement of Major Walter V. Radovich. 0416891. Air Corps to Commanding General, First Air Force, Mitchel Field, New York.

"Pursuant to instructions of the Commanding General First Air Force, contained in letter dated 10 August, 1944, the above named officer is still being held in confinement.

"Douglas Johnston, Colonel Air Corps."

The Court: What is the date of that?

The Witness: 16 September, 1944.

Mr. Ansell: Your Honor will perceive we were off a day or two on that.

The Court: 16 September, 1944.

Q. I had intended to sandwich between those two, and I thought I was calling for that—and this is quite all right— 1775 a communication of which this is a copy (handing to witness). Have you got that, Captain? A. No, sir.

Q. You haven't got that? A. No, sir.

Mr. Ansell: I presume Mr. McGohey would not hesitate to stipulate that in accordance with the Commanding General's order, that Johnston, the Base Commander, reported back to him that he had confined Radovich on the 19th of August?

Mr. McGohey: I will concede that, your Honor.

Q. Now, Captain, you have last read a communication from Colonel Johnston of the Base, to the Commanding General of the First Air Corps, that is, on notifying the 1776 Commanding General that this officer had been held in confinement, or had since been held in confinement in accordance with the authority from the Commanding General, and that letter was dated September 16, 1944, wasn't it? A. The one from the Base, yes, sir.

Q. Yes? A. Yes, sir.

Q. Now, have you among your records a letter of the same date, September 16, 1944, from General Hunter to the Commanding General in Mitchel Field, on this same subject? A. Yes, sir, I have.

Q. Would you please read that to the Court? A. (Reading) "16 September, 1944.

"Subject: Release from confinement.

"To the Commanding Officer, Army Air Base, Mitchel Field, New York.

"1. Effective this date, Major Walter V. Radovich, 0416891, Air Corps, will be released from confinement and placed under administrative restriction.

"2. The limits of the restriction will be Mitchel Field, excluding officers' club, base operations, the flying field and the flying line.

"3. The limits of the restriction will be carefully explained to Major Radovich. 1778

"F. O. D. Hunter, Major General U. S. Army, Commanding."

Q. Now, on the same date, and appertaining to the subject of administrative restriction, have you a communication from Colonel Johnston, Commander of the Base, to Major Radovich, the same being dated September 17, 1944? A. No, sir, I do not.

Mr. Ansell: I wonder if Mr. McGohey would stipulate that. It is really a formal notice. May I proceed off the record, your Honor?

The Court: Yes, sir.

(Discussion off the record.)

Mr. McGohey: Yes, sir.

Mr. Ansell: Then it is stipulated, if your Honor please, that Colonel Johnston notified Radovich that he was therefore under administrative restrictions in accordance with General Hunter's orders by this letter of September 17, 1944: 1779

"Subject: Administrative Restriction to Major W. V. Radovich.

"1. Pursuant to confidential letter Headquarters F.A.F."—First Air Force—"16 September, 1944, F.

O. D. Hunter, Major General, U. S. Army Commanding, you, Major W. V. Radovich"——

Mr. McGohey: We have stipulated that, haven't we, General?

Mr. Ansell: Yes. I just want to put it in the record.

Mr. McGohey: All right. I have no objection. I thought the stipulation would save you the trouble.

Mr. Ansell: —"are hereby released."

The Court: It has not been put in the record. He is putting in the record now what he desired to have in.

Mr. McGohey: All right, your Honor. I am sorry.

1781 Mr. Ansell: "You, Major W. V. Radovich, are hereby released from confinement and placed under administrative restriction. The limits of restrictions will be Mitchel Field, excluding the officers' club, base operations, the flying line." Signed, "Douglas Johnston."

Q. On it there is a first endorsement which I assume you do not have, "Receipt and understanding of base communication acknowledged since. W. V. Radovich, Major, Air Corps." A. No, sir, I do not.

Mr. McGohey: I will stipulate that that endorsement was put on.

The Court: All right.

1782 Mr. Ansell: And there is right beneath that endorsement this, your Honor, which I imagine Mr. McGohey will stipulate (indicating to Mr. McGohey).

Mr. McGohey: Yes, I will stipudate that.

Mr. Ansell: "Major Radovich released from confinement and placed in administrative restriction by explaining the contents of the attached letter and obtaining his signature to the first endorsement. This done in the presence of Captain Chase, M. C."

The Court: What date does that have?

Mr. Ansell: That is undated.

The Court: Apparently it is the same date as this?

Mr. Ansell: I imagine it is, sir. Ordinarily it would be, of course.

The Court: Yes. It is dated the 17th of September.

Mr. Ansell: It is, sir. Now, continuing:

"Major John Miller, between 10.30 and 10.45, 17 September, 1944, Ward 15, New Cantonment Building." Signed, "Reuben Fingold, Captain Air Corps."

Q. Captain, may I ask you if among your records you have a release from confinement addressed to the Commanding Officer, Mitchel Field, by General Hunter? A. Yes, sir, I have. 1784

Q. After the United States Attorney looks at it, if he wishes, will you please read it into the record?

Mr. McGohey: All right.

A. (Reading) "2 January, 1945. Subject: Release from Confinement.

"To Commanding Officer, Army Air Base, Mitchel Field, New York.

"1. Reference is made to letter (confidential) this headquarters above subject, 16 September, 1944.

"2. Major Radovich will be informed that the restriction imposed in paragraph 2 of the letter referred to with the exception of the officers' club, Mitchel Field, is removed. 1785

"3. He will therefore be advised that he will secure the personal permission of the Base Commander, Mitchel Field, prior to his departure from the limits of the Air Base at any time.

"F. O. D. Hunter, Major General, U. S. Army, Commanding."

Q. Captain Fritchley, may I ask you how you spell your name? A. F-r-i-t-c-h-l-e-y.

Q. Have you among your papers there the official records concerning the resignation of Major Walter V. Radovich for the good of the service, tendered from Mitchel Field in 1944? A. Yes, sir.

Q. In August, 1944. A. Yes, sir, I have.

Q. And have you all of the correspondence, endorsements, actions taken upon it and so forth, concerning that tender of resignation? A. Yes, sir.

Mr. Ansell: If your Honor please, may I ask that that be read by this officer in the record?

The Court: All right.

1787 Q. Proceed, sir.

Mr. McGohey: Could I have a look at them first?

Mr. Ansell: Oh, yes. Pardon me.

Q. The United States Attorney would like to inspect them also. A. "Mitchel Field, New York, 21 August"——

Mr. Ansell: Has the United States Attorney inspected them all?

Mr. McGohey: Oh, no, just this one letter.

A. (Continung) "21 August, 1944. Subject: Request for Resignation.

1788 "To the Adjutant General through Military Channels:

"1. I, Walter V. Radovich, Major, Air Corps, AUS 0416891, have been informed that charges are pending against me for violation of the 95th and 96th Articles of War.

"2. Therefore, under Army Regulation 605-230, paragraph 14, I hereby voluntarily submit my resignation from the Army of the United States for the good of the service.

"3. I have been informed that a resignation for the good of the service does not imply discharge under honorable conditions.

"4. I understand that I am not entitled to a certificate of service nor to an accrued leave.

"(Signed) Walter V. Radovich, Major, Air Corps."

Mr. Ansell: Of course the Court would like to have the United States Attorney inspect each one of these documents, records, concerning this subject.

Mr. McGohey: I take it you want the endorsements read, General?

Mr. Ansell: I think so, sir. 1790

Mr. McGohey: Yes, all right, I have seen the next one.

A. (Continuing) "First endorsement, Headquarters, First Air Force, Mitchel Field, New York. To the Adjutant General, Washington 25 D. C., through Commanding General. Army Air Forces, Washington 25 D. C., 27 January, 1945.

"1. A copy of the charges referred to in basic letter and copy of the report of the investigating officer are attached. The delay in forwarding this resignation was caused by the fact that the United States Attorney, Southern District of New York, New York City, requested that no action be taken in this case until he completed his investigation against the civilians who paid the bribe 1791 money.

"2. I consider the charges against Major Radovich as serious. Nevertheless, for the reasons stated below, I recommend that in lieu of trial by general court-martial his resignation for the good of the service be accepted.

"(a) He was less than twenty-four years of age when the offenses were committed and has no record of any prior disciplinary punishment.

"(b) His efficiency record shown on AGO Form No. 66-2 is reported as excellent and superior. He served overseas and distinguished himself in combat against the enemy, as is shown by the following decorations awarded him: Distinguished Flying Cross with Oak Leaf Cluster, Air Medal, Distinguished Flying Cross awarded by the British Government.

"(c) He voluntarily admits his guilt, has fully cooperated with the investigating officers and has turned over to the investigating officer a sum equal to the amount of the bribes accepted by him, which has been deposited to the credit of the United States.

1793 "3. Major Radovich is not accounted for or responsible for public property or funds.

"(signed) F. O. D. Hunter, Major General, U. S. Army, Commanding."

Mr. Ansell: Off the record.

(Discussion off the record.)

Mr. Ansell: This is the second endorsement on it, Mr. McGohey. Your Honor, may I get some information, in the presence of Mr. McGohey, off the record, to get some explanation?

The Court: All right.

(Discussion off the record.)

A. (Continuing) The second endorsement: "Headquar-
1794 ters, Army Air Forces, Washington 25 D. C., 19 February, 1945. To: The Adjutant General, Washington 25, D. C.

"1. The attached charges against Major Walter J. Radovich, 0416891, Air Corps, include the unlawful acceptance of sums aggregating $7,000 from civilians as consideration for effecting the transfer of enlisted men and preventing their shipment overseas. Evidence of the commission of offenses is supported by a detailed confession. The fact that Major Radovich otherwise has a fine combat record

makes him nevertheless guilty, although due credit should be accorded that record in imposing punishment. Such conduct on the part of an officer warrants trial by court-martial because such offenses, if proved, carry severe penalties.

"2. It is therefore recommended that the resignation tendered by subject officer be not favorably considered.

"For the Commanding General, Army Air Forces, P. A. Laking, Lieutenant Colonel, Air Corps, Chief, Classification and Separations Branch, Office Assistant Chief of Air Staff Personnel."

Q. That officer is really representing General Arnold's Headquarters, isn't he? A. Yes, sir. 1796

Q. What is the date of that? A. 19 February, 1945.

Mr. Ansell: Your Honor, I know I am not going to get through with the records, and I don't want to disturb whatever plans your Honor had in mind.

The Court: I haven't.

Mr. Ansell: You haven't any. I was wondering if——

The Court: I did not have any plan. I did have a hope. I hoped that this question could be submitted this afternoon. I have since amended that to hope that the evidence might be submitted this afternoon.

Mr. Ansell: I do not believe it can be.

The Court: Do you want to stop now?

Mr. Ansell: Might I, without your Honor's feeling 1797
that I am disrupting the program?

The Court: I have no such feeling. Have you elicited from the witness all you expect to?

Mr. Ansell: No. But I have to call another witness with some more records, and this witness will have to come back.

The Court: What have you to say, Mr. McGohey?

Mr. McGohey: Well, your Honor, I was wonder-

ing if we could not get these endorsements in now with reference to this resignation. I don't know how much more we are going to go through with this witness, but I think it would be helpful if we could get finished with that much.

The Court: Suppose you take a look at all of them at one time.

Mr. McGohey: I will be glad to.

The Court: Off the record.

(Discussion off the record.)

The Court: All right, read them.

1799 A. (Continuing) Third endorsement: "War Department AGO 2 March, 1945. Through the Commanding General, Army Air Forces, Washington, D. C. To the Commanding General First Air Forces, Mitchel Field, New York.

"Inform Major Walter V. Radovich, 0416891, Air Corps, his resignation is not favorably considered.

"By Order of the Secretary of War." And the signature I am unable to read. "Adjutant General."

Fourth endorsement: "Headquarters, Army Air Forces, Washington 25 D. C., 8 March, 1945. Through Commanding General, First Air Forces, Mitchel Field, New York. To Major Walter V. Radovich, 0416891, Air Corps, Mitchel Field, New York.

"1. Attention is invited to preceding second and third endorsements.

1800 "2. Court-martial proceedings will be continued in this case by command of General Arnold.

"P. A. Laking, Lieut.-Col. Air Corps, Chief, Classification and Separations Branch, Office Assistant Chief Air Staff Personnel."

Q. That is General Arnold's headquarters. A. "20 March, 1945. Subject: Resignation for the good of the service. To: Major Walter V. Radovich, 0416891, Air

Corps. Through Commanding Officer, Mitchel Field, New York. The resignation submitted by you on 21 August, 1944, has been returned to this headquarters by third endorsement, War Department AGO, 2 March, 1945 (AgPO-S 201, Radovich, Walter V.), as follows:

"Inform Major Walter V. Radovich, 0416891, Air Corps, his resignation is not favorably considered.

"By Command of Major General Hunter, Raynor Garey, Colonel, AGD, Adjutant General."

Q. All right, sir.

Mr. Ansell: May I ask the witness, if your Honor please: 1802

Q. If there is anything on the record to show when that notification that the resignation was not approved reached Major Radovich? A. No, sir, I have no record.

The Court: Does that letter which you just read bear a date?

The Witness: 20 March, 1945.

Q. There are other record in the 201 file, are there not, Captain? A. Yes, sir, there are.

Mr. Ansell: That is right. Your Honor, this will be a beautiful place for us to stop.

The Court: All right, sir. You may be excused for the present. Except that I want to ask one or two things. Give me the citation to the McNab case, will you? 1803

Mr. Rudykoff: 318 U. S.

Mr. Robb: 332.

The Court: And the Anderson case?

Mr. Robb: 318 U. S. 350. And, if the Court please, might we also invite your Honor's attention to the

Bram case, 168 U. S. 532. My friend here (Mr. Rudykoff) says it is pretty old, but it is still the law.

The Court: It might or might not be. Then there is the Mitchell case.

Mr. McGohey: 322 U. S.

The Court: What page?

Mr. McGohey: I don't have the page, your Honor.

The Court: That is all right, I can find it. Possibly I can find this circuit's discussion of the McNab case and the Keegan case.

Mr. Rudykoff: They had something to say in this circuit about it.

1805 The Court: They had quite a lot to say. I think possibly I can find that. Now I take it that you are going to contend that the statement of September 15th, approximately, is inadmissible and that the vice therein affected the March statement—or is it March?

Mr. McGohey: Yes, sir, March 15 and 17.

The Court: Can you give me any authority on that proposition?

Mr. Robb: If the Court please, I may call your attention to the fact that the March 15 statement in its third line has this expression: "I, Walter V. Radovich, make the following voluntary supplementary statement." Of course, Agent Flynn testified that, in substance——

1806 The Court: I am familiar with what he said, but I want to ask if you have any authority which you can cite me on that proposition which I may be considering?

Mr. Ansell: As I remember, your Honor, in Wigmore, I have a note here, and you know the type of presentation that such writers get out, I have a citation here from Wigmore—I hope I have it. As I remember, it cited many, many cases.

Mr. Rudykoff: The Mitchell case is at page 65, your Honor, 322 U. S. The McNab case is page 332 of 318.

The Court: Do you happen to have in your memorandum the citation to the Keegan case, as decided in this circuit?

Mr. Rudykoff: Apparently not, your Honor.

Mr. Ansell: Well, your Honor, as frequently true of lawyers, I could have said that I had a citation in my little red book here from Wigmore, and I thought that would be sufficient as a reference to the cases. But it is to this effect, and I understand it to be the law, that if there was a condition of circumstances surrounding the making of a confession such as to 1808
render it involuntary and therefore inadmissible in the eyes of the law at one time, that subsequent confessions upon that subject would not be admissible because of the presumption that the state of mind continued over into the making of those confessions.

I find that statement made in some cases and in many textbooks, and I regret that I haven't the citation to that here. Of course, during the week-end we will try to get that. At the time we were preparing our law on this subject we had not supposed that this particular thing would come in, I mean that it would be proposed by Mr. McGohey.

The Court: All right, sir. Well, is there anything else that anybody wishes to do right now? 1809

Mr. McGohey: Your Honor, do I understand that this concludes the presentation of the evidence on this point?

Mr. Robb: Oh, no.

The Court: I regret to say that I understand to the contrary, that it is not concluded.

Mr. Ansell: I regret to say, your Honor, this is a vital, a crucial point, in the trial of this case, and,

while I wish we could abbreviate it, I see no way of doing it.

Mr. McGohey: I am not complaining about that. I just wanted to ascertain the fact.

The Court: In the expression of my regret I did not mean to imply any such thing.

Mr. Ansell: I know that, your Honor.

The Court: Pure and unadulterated regret. All right. Court may be adjourned until Monday morning at 10.30.

(Adjourned to Monday, October 15, 1945, at 10.30 A. M.)

1811

New York, October 15, 1945, 10.30 A. M.

TRIAL RESUMED.

(The following proceedings were had in the absence of the jury:)

The Court: Have you further evidence, gentlemen, on the question presently before the Court?

Mr. Ansell: I think Captain Fritchley was on the stand when we adjourned.

The Court: That is right.

1812 Mr. Ansell: May I have him recalled, if you please?

The Court: Yes.

RICHARD G. FRITCHLEY resumed.

Direct examination (continued) by Mr. Ansell.

Q. Captain, I observe that I failed to identify on Thursday when you were on the stand the record that you had,

and from which you testified the other day. You are the official custodian for the present purpose of those records—A. Yes, sir.

Q. —and you were, were you not? A. Yes, sir.

Mr. Ansell: May I ask Mr. McGohey now for record purposes as to whether Major Radovich was ever taken before a committing magistrate?

Mr. McGohey: When, General?

Mr. Ansell: Ever.

Mr. McGohey: Oh, yes. He was arraigned before a District Judge in the District Court here. I think the indictment will show that. 1814

The Clerk: That is right, Mr. McGohey.

Mr. Ansell: Well, I ask particularly about his having been committed by a committing magistrate according to the usual procedure.

Mr. McGohey: Why, Major Radovich was arraigned on this indictment. He had never been arrested. He had never been picked up on any complaint, so that upon the filing of this indictment he was indicted, and with the filing of the indictment he came in and pleaded not guilty——

Mr. Ansell: That is quite all right, Mr. McGohey.

Mr. McGohey: —as the record shows, on July 16, 1945. I think he pleaded before Judge Knox according to this, isn't that right, Mr. Clerk?

The Clerk: Yes, sir, Mr. McGohey. 1815

Mr. Ansell: Mr. McGohey and I had some little colloquy, manifesting no disagreement about a paragraph found in this official record furnished to us under the appropriate Article of War, and particularly this paragraph. I thought, if your Honor please, and Mr. McGohey, that I read it into the record with Mr. McGohey's assent. I find now that I did not do so.

Mr. McGohey said that he admitted that this was an official record. He did not admit the truth of the statements contained therein. Here it is here (handing to Mr. McGohey).

Mr. McGohey: Yes. What is the point now, General?

Mr. Ansell: I failed to read it into the record as I had intended to do.

Mr. McGohey: Oh, I see.

The Court: All right. Go ahead and do so.

Mr. Ansell (reading): "Delay. The charges were preferred on 10 August 1944. Investigation completed
1817 about 24 August 1944 and received at this headquarters 25 August 1944.

"The delay referring them (charges) for trial was at the specific request of United States Attorney, Southern District of New York, who was taking action with a view to prosecution of the two civilians involved in paying the bribes to the accused."

That is all I have for this witness.

Mr. Keenan: Were there any exhibits introduced, General? I was away.

The Court: Certain records, Mr. Keenan, were read into the record.

Mr. McGohey: Pardon me, your Honor, may we ask the witness to stay for a moment?

The Court: I do not think anything was actually
1818 filed in evidence.

Mr. McGohey: There was one thing more, your Honor. I do not know that that document from which General Ansell has just read has been sufficiently identified in the record.

Mr. Ansell: I identified it the other day as the charge sheet required to be furnished with the court-martial record, which is itself required to be furnished the accused under the 111th Article.

The Court: Have you any questions of the witness?

Mr. McGohey: I have no questions of the witness, your Honor, but I asked that he come back because I thought it might be necessary to have that document identified. I do not believe it is the charge sheet.

Mr. Ansell: Well, it is a paper consisting of the report of the Staff Judge Advocate to the Commanding General which accompanies all papers thereafter referred to the court-martial and made a part of the court-martial records.

The Court: All right. Do you wish to ask this witness any questions, Mr. Keenan?

Mr. Keenan: Will you indulge me for just a brief 1820
moment?

The Court: Yes, sir.

Mr. Keenan: I have no questions.

Mr. Ansell: I have no further questions. It is entirely possible, if your Honor please, that these witnesses with the records will be needed or may be needed at a later stage of the proceeding by us. So I suppose t ey will not be discharged, depending upon this course.

The Court: I assume that they will not be.

Mr. Ansell: That is right.

Mr. Robb: I will call Mr. Wallace, if the Court please.

1821

EDWARD C. WALLACE, called as a witness on behalf of defendant Radovich, being first duly sworn, testified as follows:

Direct examination by Mr. Robb.

Q. Mr. Wallace, for the record, would you give us your official occupation, please, sir? A. Assistant United States Attorney for the Southern District of New York.

Q. How long have you held that position? A. Since January, 1942.

Q. And did there come a time, Mr. Wallace, when you assumed charge of the case now on trial? A. Yes.

Q. And the investigation of that case? A. Under the direction of the United States Attorney.

Q. Yes. About when was that, sir? A. In the Fall of 1944.

Q. And did there come a time in the course of your work on that case when you interviewed certain witnesses, including Major Radovich? A. Yes.

Q. Do you recall when you first interviewed Major Rado-
1823 vich? A. I do not.

Q. Can you give us any estimate or approximation of that time? A. My guess would be that it was in the Fall of 1944.

Q. By the Fall, would you mean October or November? A. I would say the last three months of 1944. It may have been any time during those three months.

Q. All right. Where did you first interview him, Mr. Wallace? A. In my office.

Q. Here in this building? A. That is correct.

Q. And would you tell us whether or not you interviewed him from time to time after that time, whether you had a subsequent interview with him? A. Yes, I did.

Q. And can you tell us about how many? A. I would
1824 think about four or five.

Q. And those took place where? A. In my office.

Q. Could you give us the approximate dates of those? A. No, I couldn't.

Q. Could you tell us about when you had the last one? A. It would be some time prior to the day that you appeared with Major Radovich in my office, whatever day that was.

Q. By the way, Mr. Wallace, was any subpoena served on the Major to come to your office? A. I think there was.

Q. Could you tell if you served that about when you interviewed him (handing)? A. For the first time?

Q. Yes, sir. A. I don't know that a subpoena was served on him the first time he appeared.

Q. I show you this card, which is apparently a subpoena, and ask you if that refreshes your recollection as to when you saw him the first time? A. Well, that would be about right, November 10, 1944.

Q. November 10, 1944? A. But I don't know that that was the first time, but it would be about that time.

Q. About then, yes, sir. Mr. Wallace, did there come a time when an indictment was returned against the two Bayer brothers, who are on trial here? A. Yes. 1826

Q. About when was that? A. In March, 1945.

Q. How many times had you talked to Major Radovich between the date of your first interview and the time of that indictment, approximately? A. I would think about three times.

Q. Now, Mr. Wallace, by the way, he was not named in that indictment that was returned in March, was he? A. No, he was not.

Q. Mr. Wallace, did you have any conversation with Major Radovich about whether or not he was to be named in that indictment? A. I did not.

Q. Was there ever anything indicated to him as to whether or not he would be named? A. There was not.

Q. Was there any suggestion of any kind made as to whether or not he would be indicted? A. No. 1827

Q. Why didn't you have him indicted?

Mr. McGohey: I object to that, your Honor.

The Court: I will sustain the objection to that.

Q. Was it your policy to allow the military court to handle military matters and not to indict army officers in

cases such as this? A. I would say that that is frequently the case.

Q. Well, sir, was it your policy at that time? A. Usually that is the case.

Q. Yes, sir. By the way, on the occasions of your interviews with Major Radovich, who else was present? A. Usually Mr. Flynn. I think he may have been present on every occasion, but I am not certain of that.

Q. Now, Mr. Wallace, will you tell us whether or not it was understood at the time of the talk to Major Radovich that if he would help you in connection with making a case against the Bayers, you would help him in his troubles
1829 with the military? A. No, there wasn't such an understanding.

Q. There was no such understanding? A. No.

Q. Was there any understanding that you would make any possible representation on his behalf to the military authorities? A. Will you repeat that first part of that question?

Q. Was there any understanding that you would make any possible representation— A. There was no understanding.

Q. No understanding? A. No, sir.

Q. Now, Mr. Wallace, you recall testifying before the court-martial, do you not? A. Yes.

Q. That is, a court-martial of the Major? A. Yes, sir.

1830 Mr. Robb: At this time, if the Court please, I announce surprise, and ask that I may be allowed to cross-examine the witness.

The Court: All right, sir. You may proceed along that line without objection.

Q. Mr. Wallace, I want to read you certain questions and answers from your testimony before the court-martial:

"Q. You never heard Mr. Flynn tell the accused that if he did continue to help you and co-operate with you, you would help the accused with the Army? A. Did I ever heard Mr. Flynn say that?

"Q. Yes. A. I don't recall.

"Q. Well, that was the understanding, though, wasn't it, Mr. Wallace? A. I think that Major Radovich felt that we were very friendly toward him and if there was any representation on his behalf that could be made, it probably would be made.

"Q. Did you tell him that? A. I don't—as I said, I don't recall whether I told him that, but I would say that he would be justified in assuming that. 1832

"Q. That was understood, wasn't it? Isn't that a fair way to put it? A. I'd say it was."

Mr. McGohey: May I have the page?

Mr. Robb: Page 199-200.

Q. "Q. That if he helped you, you would help him? A. That—naturally, that we would say to the military authorities the fact that he had co-operated fully with the civilian authorities." Now, Mr. Wallace, was that testimony you gave before the court-martial the truth? A. Yes.

Q. And is it now the truth? A. Yes, sir, and I do not think there is any inconsistency between what I said then and——

Q. Mr. Wallace, I do not want to argue about that. Possibly we had better let the Court decide that. A. All right. 1833

Q. Now, let me read you this question and answer——

Mr. Robb: Page 196, Mr. McGohey.

Q. "Q. Your want to use Major Radovich as a witness against the Bayers, don't you? A. Yes.

"Q. Now, did you ever have any discussion with the accused as to whether or not you were going to have him indicted? A. No. I don't think I ever indicated

to him one way or the other, whether he would be indicted or not, although I think he would be justified in assuming at the time that he probably would not be indicted.

"Q. Why was he justified in that assumption? A. Because of the co-operation he showed us and the co-operation we showed him, and the fact that he knows, that he should have known, or I think he probably did hear, that it was our policy to have military courts or military tribunals take care of military personnel, and the civil courts take care of civil persons involved.

"Q. You could have had him indicted, could you not?

1835 A. You mean is it possible under the law?

"Q. That is right. A. Yes, of course you understand that it is the function of the grand jury to indict and not mine."

Now, that testimony was the truth, was it not? A. Yes.

Q. And still is, is it not? A. Yes.

Q. Now, did you ask the grand jury to indict the Major at the same time that they found the first indictment against the Bayers?

Mr. McGohey: I object to that, your Honor.

The Court: I overrule the objection.

A. My recollection is that I presented the evidence, and

1836 whether I made any specific request as to who should be indicted or not, I don't recall at this time.

Q. Now, would you be able, Mr. Wallace, to refresh your recollection if you looked at the minutes of the grand jury? A. I assume I would.

Q. I beg pardon? A. I assume I would.

Q. Could you do that? A. They have not been transcribed, as far as I know.

Q. Mr. Wallace, there did come a time, did there not, when you asked the grand jury to indict the Major, is that right? A. I don't recall that I made a specific request.

Q. Well, there did come a time when you did obtain an indictment against Major Radovich, did there not? A. There did come a time when the grand jury indicted the Major.

Q. About when was that? A. July, 1945.

Q. And that, Mr. Wallace, was after Major Radovich had ceased to co-operate with you, isn't that right? A. That was after Major Radovich through you had stated that he was not going to be a witness in the case.

Q. Yes, sir. Now, Mr. Wallace, is it or is it not a fact 1838
that the reason why you had him indicted was that he had told you through me that he was not going to be a witness?

Mr. McGohey: Now, if your Honor please, I object to the form of that question, the reason he had him indicted. I think the Court will take judicial notice of the fact that the grand jury indicts.

The Court: I sustain the objection to that question.

Q. Did the fact that he had advised you through me that he was not going to continue to talk to you, or to make statements to you, have anything to do, Mr. Wallace, with the indictment of Major Radovich, so far as you know? 1839

Mr. McGohey: I object to that, your Honor.

The Court: I will overrule the objection.

A. You mean whether that fact——

Q. I will put it this way, Mr. Wallace: Did that fact cause you to resubmit the case to the grand jury? A. I was directed to resubmit the case to the grand jury.

Q. All right, sir. By whom? A. By the United States Attorney.

Q. All right. Now, would you answer my question: Was the failure of Major Radovich, or his refusal to continue to make statement to you, the reason why the case was resubmitted to the grand jury?

Mr. McGohey: Your Honor, may I at this time concede for the purposes of this hearing that the reason that the case was resubmitted to the grand jury was the statement by Major Radovich to me through counsel, Mr. Robb, that he would not testify?

1841 The Court: All right.

Mr. McGohey: I concede that.

Mr. Robb: Would your Honor indulge me?

The Court: Yes, sir.

Mr. Robb: That is all.

Mr. Keenan: Wait a minute, I want to ask a question.

The Court: All right.

Cross-examination by Mr. Keenan.

Q. Mr. Wallace, are we to understand that you do not recall now whether you indicated at the grand jury at the time that the indictments were brought in against Samuel Bayer and Elias Bayer and Murray Greenblatt,

1842 that you do not recall whether you indicated that you believed that an indictment should be returned also against Major Radovich? A. That is not what I said, Mr. Keenan.

Q. Well, what did you say to that question? A. I say I do not recall.

Q. Do you recall? A. I said I do not recall whether or not I made a specific request at the time.

Q. Well, let us see about the word "specific". Did you indicate to the grand jury, or did you request, specifically

or otherwise, that Radovich be not indicted, or be indicted, at the time the indictments were brought in against the Bayers and Greenblatt? A. I do not recall whether I requested that Radovich, Major Radovich, be indicted or not, although the evidence that was adduced before the grand jury I would think would lead to the conclusion that he, Samuel and Elias Bayer, and Murray Greenblatt, in my opinion, ought to be indicted.

Q. Thank you for that last answer, which is not exactly what I asked you. I asked you if you can recall whether or not, or whether you are going to tell us that you do not recall whether you requested in substance the grand jury to return an indictment against Radovich too, when 1844
they brought in their indictment on or about the 28th day of March, 1945? A. I would say that I did not specifically request——

Q. I did not say "specifically". A. —or any other way.

Q. I left the word "specifically" out. I am asking if your answer would be different if we take out the word "specifically". A. I would say that I did not request, although I haven't any recollection of the incident at this time.

Q. Well, is your memory faint about what happened in this case before the grand jury in the last week of March of 1945? A. No, not particularly.

Q. Well, is it at all faint? Is your memory good or poor about that? A. I think my memory is average about that. It is something that happened some seven months ago.

Q. How many cases have you handled since March 28, 1845
1945? How many cases have you tried in this Court? A. I would say that I have handled about twenty or thirty cases, and I have tried about two cases.

Q. Yes. And isn't this one of the most important cases in your viewpoint that you have had since you have been in the department? A. One of the more important cases.

Q. Have you heard Mr. McGohey make the statement in your presence that he considers this tantamount in substance to treason?

The Court: We have been over that.

Mr. Keenan: Your Honor, I am testing the veracity of the witness.

The Court: We have gone all over that.

Mr. Keenan: I beg your pardon.

Q. Was the subject matter discussed between the members of the grand jury and yourself as to whether or not
1847 Major Radovich should be indicted along with the Bayers in March of 1945? A. No, I don't recall any such discussion.

Q. Were you asked any questions; were you asked your views by any member of the grand jury as to whether or not Major Radovich ought or ought not to be indicted? A. I didn't recall being asked my views on that subject at all.

Q. So that as we leave the matter, in substance, if we understand the substance of your testimony, it is that you have no recollection of whether or not that matter was discussed, or whether you made any recommendations to the grand jury whatsoever with reference to indicting or not indicting Major Radovich? A. That is right. I have no recollection of it.

1848 Q. Of course, the evidence before the grand jury was indicative of his guilt, wasn't it?

Mr. McGohey: I object to that, your Honor.

Mr. Keenan: I am testing the memory of this witness. There is no jury present.

The Court: I will let him answer the question.

A. Well, I would think that it was, yes.

Q. Well, did it strike you that it was strange that the grand jury would not indict Radovich— A. No.

Q. —along with the other people that were indicted?

Mr. McGohey: I object to that, your Honor.

The Court: I will sustain the objection as to what he thought.

Q. I am asking you now, have you discussed with Mr. McGohey the question of whether or not an indictment should be sought from the grand jury against Major Radovich prior to the 28th day of March, 1945?

1850

Mr. McGohey: I am afraid that I did not get the full question.

A. I do not——

Mr. Keenan: Wait a minute.

Mr. McGohey: I would like to have the question read in full, your Honor, please.

The Court: Yes. Please read it.

Mr. Keenan: All right. Read it, and then the answer: "I do not——"

(Question and answer read.)

Q. Go ahead, please. Finish your answer, please. A. I do not recall at this moment.

1851

Q. Your memory isn't very good on that whole subject, is it? A. I think my memory is good.

Q. But you can't recall whether you ever discussed with Mr. McGohey the matter of whether or not an indictment should be sought against Major Radovich prior to March 28, 1945? A. I don't recall it at this moment.

Q. Well, by the way, you had discussed this matter with Mr. McGohey prior to March 28, 1945, hadn't you? I mean

with reference to the matter, the trial of the matter? A. Yes, and with his predecessor, Mr. McNally.

Q. I did not ask that. Just Mr. McGohey. And you were present at least on two or three occasions while I was there talking to Mr. McGohey in the office about this matter, weren't you? A. That is correct.

Q. And that was prior to March 25, 1945, wasn't it? A. That was both before and after March, 1945.

Q. Yes. Well, I brought the men into the office of the United States Attorney on or about the 7th of February, 1945, is that right? A. That is correct.

Q. And we had a rather lengthy interview at that time,
1853 more than an hour? A. At the time you brought them in?

Q. No, before I brought them in. A. Yes.

Q. And you were there during that discussion between Mr. McGohey and myself, and you participated in it to some extent, didn't you, some minor extent? A. Yes, very slightly.

Q. And you, of course, have been in charge of this particular matter, haven't you, and all phases of it? A. That is correct, sir.

Q. And you asked all the questions of Samuel Bayer, and of Elias Bayer, at the time that they were interrogated; that is, for the Government? A. Yes.

Q. I asked four or five questions of Elias Bayer? A. That is right.

1854 Q. Now, isn't it a fact, Mr. Wallace, that the policy of the Government was to allow the Army to take care of Major Radovich or—I withdraw that. The policy of the United States Attorney's office was to have the Army take care of derelictions of this type if such there be in the Army, and the United States Attorney to take charge of such matters as affected civilians?

The Court: He has been examined on that subject.

Mr. Keenan: I beg pardon?

The Court: He has been examined on that subject before.

Mr. Keenan: I have not asked him and I wanted to know about it. This is just preliminary, if your Honor please.

The Court: Sir?

Mr. Keenan: It is just a preliminary question.

The Court: All right.

A. That is usually the case.

Q. And that policy was not followed in this case, was it? A. I think that is obvious, too.

Q. Can you tell us why you departed from your ordinary policy in handling this matter? A. I think Mr. McGohey has already answered that question. 1856

Q. Well, can you tell us?

Mr. McGohey: I object to this, your Honor.

Mr. Keenan: Mr. McGohey, I submit, has not told us that at all.

Mr. McGohey: I say, your Honor, that I conceded the reason that I directed Mr. Wallace to resubmit this case to the grand jury in July, which was because of the fact that Major Radovich through his counsel some time in June had informed me that he was not going to testify as a witness, as he had previously in the grand jury.

Mr. Robb: If the Court please, I thought that that statement included this fact: that we also told Mr. McGohey that the Major was not going to make any more statements to him, or to anybody in the United States Attorney's office. 1857

Mr. McGohey: That is correct.

Mr. Robb: Do you agree to that, Mr. McGohey?

Mr. McGohey: Yes; that was the understanding.

Mr. Robb: Yes?

Mr. McGohey: Yes.
The Court: All right.

Q. Did you not state to the court-martial some time——

Mr. Keenan: When was the court-martial?
Mr. Robb: June 27th.

Q. —in the latter part of June, 1945, speaking of the United States Attorney's office, that "it was our policy to have military tribunals take care of military personnel and civil courts take care of civil persons involved"? Didn't you state that? A. Didn't I say "as a rule" in
1859 answer to that question, or "generally", or some such phrase?

Q. I do not think so. I will let you read the statement if you wish. A. Well, if I didn't, I should have. I would say usually that is the case, although it frequently happens that we do prosecute military personnel in our courts.

Q. Well, the short of it is this, isn't it, Mr. Wallace: that as long as Major Radovich was willing to co-operate with the Government, you didn't care to have him indicted, but when you found that he was not going to co-operate with the Government you did resubmit the matter to the grand jury for the purposes of obtaining an indictment?

Mr. McGohey: I object, your Honor, to the form
1860 of that question, what we intended; whether we intended to have him indicted or not. All we have ever done was to present evidence to the grand jury.

Mr. Keenan: Your Honor, I do think we ought to deal in realisms to some extent, and this is cross-examination, and I am submitting as a matter of fairness that there may be justification for this, but I am entitled to bring out to this Court, and ultimately to this jury, that the pressure that was brought to bear

upon Major Radovich to get him to testify, which affects my clients more than anyone else, is such that certainly in a court of justice I think we are entitled to know what efforts were made. This is an open matter, and it is no personal attack, Mr. McGohey.

Mr. McGohey: I understand that.

Mr. Keenan: Mr. McGohey so understands.

The Court: Let me hear the question, please.

(Question read.)

The Court: Overrule the objection.

A. Well, I think it should be brought out that there was never any pressure brought on Major Radovich to testify or not to testify; that Major Radovich was never threatened with an indictment or that he wasn't going to be indicted. 1862

Q. Now, with that qualification, will you be good enough to answer the question?

Mr. Keenan: Read the question to him again, please, Mr. Reporter.

Q. (Question read.) A. My personal feelings, as far as Major Radovich's indictment, when I first presented the case, were that I did not—I hoped and did not wish to see the grand jury indict him.

Q. I am not interrogating you, Mr. Wallace, for any reasons as to your personal feelings; I am asking you for your conduct as Assistant United States Attorney by these questions, and with that point in view. 1863

Mr. Keenan: Now, will you again read the question to the witness and see if we can get him to answer?

Q. (Question reread.) A. All right. I presented the evidence to the grand jury as—I will not discuss what

the evidence was, but the evidence that was presented to the second grand jury was not, as I recall it, exactly the same as to the first grand jury.

Mr. Keenan: Now, will you please read the question to the witness a third time? I would like to have the Court, with great respect, direct the witness to answer the question, which you have already said he should answer.

The Court: All right.

Mr. Keenan: Read it again, please.

The Court: It is not such a question that requires a categorical yes or no answer. Go ahead.

1865

(Question again read.)

Mr. McGohey: Now, if your Honor please, I submit that that question is calling precisely for this witness' personal opinion as to what he wanted, and I think that the three attempts of Mr. Wallace were to make certain in the three answers, so that he has answered what I think Mr. Keenan is trying to get at with that involved question.

Mr. Keenan: Mr. Wallace is the United States Attorney's assistant, but he practices law with his head and not with his heart, and he ought to be able to speak the English language and answer my question.

Mr. McGohey: Now, I move to strike that out.

1866

The Court: I did not hear it. Apparently he has answered the question, but if you wish to add or subtract anything to what you said to the question, you may do so.

The Witness: I think I can answer it, yes, taking the first part of that question to refer to my doings, and as far as the attitude of the United States Attorney's office is concerned, I think that already has been stated by the attorney.

Mr. Keenan: I do not want to be offensive, your Honor, but I thought your Honor here directed him to answer it, and do I understand from the statement which your Honor has made that if there is anything more he wants to add or subtract, that that terminates the inquiry on that question?

The Court: I think that he did answer it.

Mr. Keenan: All right. I bow to your Honor's ruling on that.

Q. There is no question about it but that the Major was very co-operative with you for a considerable period of time, is there? A. There is no question about it. 1868

Q. And there is no question about it that you told him in substance that it would be better for him, in your opinion, to continue to co-operate with the Government, and that you so testified at the court-martial? A. That I told him that in substance?

Q. Yes, or indicated that to him. I think that was the word used, "indicated".

Mr. McGohey: Where?

Mr. Keenan: 194 is the page.

A. Well, I would like to answer that question in this fashion, that Major Radovich always had the attitude that he wanted to make a clean breast of the whole thing, that he was in a mess, and that the thing for him to do was 1869 to tell his story fully, letting the chips fall where they may. And I, of course—I don't know whether I expressed it to him—I felt that, I certainly felt that that was the correct thing for him to do.

Q. Were you asked at the court-martial by Mr. Robb,

"Did you have any discussion with him as to what might happen to him if he didn't talk to you about it

at any time?" and did you answer, "You mean if I made any threats to him as to——

"Q. I didn't ask you that. Did you have any discussion with him as to what might happen to him if he didn't testify before the grand jury?" And you answered: "No, it never arose because there was never any attitude on his part that would ever lead me to believe that he was not going to testify before the grand jury. He was quite co-operative."

Did you make those answers to those questions? A. Yes, sir.

1871 Q. "Have you since that time—since that time—had any discussion with him or made any statements to him as to what would happen to him if he didn't co-operate with you? A. No, I have indicated to him that I thought he might be making a mistake if he didn't, but that is as far as I went."

Did you make that answer to the question asked of you? A. Yes, I did.

Q. "When did you indicate that to him? A. That would have been, I think, in June or May." Did you make that answer? A. Yes, I did.

Q. So that you had a discussion with Major Radovich after the indictment was returned against him? A. I want to——

1872 Mr. McGohey: Would you read the following two questions, please.

Mr. Keenan: I would be glad to, Mr. McGohey, despite the fact that the Government seems to have a way of wanting to present its own evidence, but I will accommodate you. Which are they?

Mr. McGohey: The following two questions right after that last one. "I think it would have been in

June or May." The question was "Where?" The next question was, "Where?"

Mr. Keenan: "It was in the office of the United States Attorney.

"Q. Did you tell him why you thought he would make a mistake? A. No."

Is that it?

Mr. McGohey: Yes.

Mr. Keenan: Do you want me to go on there?

Mr. McGohey: No, I think that is sufficient.

Q. Now, we have the point that it was in the United States Attorney's office after he was indicted. Did you make the statement to him that you have— A. No, that is not so. It wasn't after he was indicted. 1874

Mr. McGohey: Now, if your Honor please, I object further to this line of questioning because it appears it happened in May or June of 1945, and the statement which the Government has offered in evidence and the admissibility of which I thought this proceeding was related to, was given by the defendant in March of 1945.

The Court: What is the date of it?

Mr. McGohey: The date of the statement is March 17th, 1945—15th and 17th. The testimony is that it was started on the 15th and finished up on the 17th. 1875

The Court: While I am making an entry about the date, does it not appear in the evidence when the first statement was? Wasn't it August 15th?

The Witness: September.

Mr. Robb: September, if the Court please. September 5th or 6th, Mr. Flynn testified. Is the first statement your Honor referred to the one made at the hospital?

The Court: Yes.

Mr. Robb: Yes. September 5th or 6th, 1944.

Mr. Keenan: If the United States Attorney is objecting——

Mr. McGohey: Yes. I made an objection in the ground that all of these questions we are talking about now are statements made in June, 1945, and I don't think they have any relevancy or materiality to the admissibility of the statement made in March, 1945.

Mr. Keenan: I want to state to this Court——

The Court: It might have some bearing. I am going to overrule the objection.

1877 Q. When were the statements made? After the indictment was returned against Major Radovich or before?

Mr. McGohey: Which statements, please?

A. Before.

Mr. Keenan: The statement, "No, I have indicated to him that I thought he might be making a mistake if he didn't——"

The Witness: In connection with that question, Mr. Keenan——

Mr. Keenan: "But that is as far as I went."

1878 Q. I am just asking—I was completely confused about that—that occurred before Major Radovich's indictment, isn't that correct? A. That incident occurred before he was indicted.

Q. All right. A. May I make a correction in that statement?

Q. You mean that you want to correct something that you stated before the— A. At the court-martial.

Q. At the court-martial? A. Yes.

Q. Mr. Wallace, I always believe in letting a man do that. Yes. A. That statement was made not by me but by Mr. McGohey in the presence of Mr. Robb, to Mr. Radovich in Mr. McGohey's office and in my presence, too.

Q. What statement was that? A. That I think when—when I said or quoted myself as saying to Major Radovich that I thought he was making a mistake. My recollection is now that it was actually Mr. McGohey who made that statement to Mr. Radovich in the presence of Mr. Robb, and that I was present there.

Q. That is, it was Mr. McGohey then who made the statement to Major Radovich— A. That is correct.

Q. —that he thought Major Radovich was making a mistake not continuing to give you people statements? A. No, I don't want you to add anything to it, Mr. Keenan. 1880

Q. I don't want to add. You are the one who asked the right to add. I will read the question: "Have you since that time had any discussion with him?"—that is, Major Radovich—"or made any statements to him about what would happen to him if he didn't co-operate with you?" Now, you give the answer before the court-martial which I have read: "No, I have indicated to him that I thought he might be making a mistake if he didn't but that is as far as I went." Now, you want to add to that, as I understood, to say that statement was not made by Mr. Wallace but was made by Mr. McGohey? A. That is right. 1881

Q. Was that statement made by Mr. McGohey to Major Radovich? A. Yes.

Q. Now, you were asked the next question, "Did you tell him why you thought he was making a mistake?" and you answered, "No." Now that you have refreshed your memory that it was Mr. McGohey that made the statement instead of you, I will ask you do you recall if Mr. McGohey asked Major Radovich—told Major Radovich why he felt he was making a mistake in not co-operating? A. No, he did not.

Q. Did Major Radovich ask? A. No.

Q. So it was just left at this, that the United States Attorney in the United States Attorney's office, some time in May or June, told Major Radovich that the United States Attorney felt that Major Radovich was making a mistake in not co-operating further with the Government, with the United States Attorney's office in this prosecution? A. Well, I think I ought—I don't like to add on anything. The statement, as I recall it, was that Mr. McGohey——

Q. I don't mind you adding on if it is true. A. The statement, as I recall it, by Mr. McGohey was, "I think you are making a mistake" or "I think you might be making

1883 a mistake."

Q. That was in reference to something, wasn't it? A. That is correct. It was in reference to a statement by Mr. Robb that Major Radovich was not going to be a witness.

Q. Was Mr. Robb present? A. Yes.

Q. And did Mr. Robb announce that Major Radovich was not going to co-operate further with the Government in these cases? A. Yes.

Q. It was after that that the indictment was filed? A. It was, in point of time.

Q. Now, Mr. Wallace, when you go into cases of this nature you keep a diary, don't you? A. No, I do not.

Q. Do you have a girl outside your office who keeps a diary? A. No.

1884

Q. Do you keep any notes as to the dates people come in to see you? A. I do not.

Q. Of course, you were in contact with the members of the armed forces that were investigating this case, were you not? A. I was not.

Q. You did have, however, this young man, Mr. Flynn of the F.B.I., he was working with you? A. He was.

Q. And under your direction? A. He was.

Q. And he had contact with the Army officers? A. I think he has so testified.

Q. No, I don't care about that. Please answer my question. He did have contact to your knowledge, didn't he? A. No, he didn't, to my knowledge.

Q. Oh. Then you don't know that Mr. Flynn was in contact with the Army people in this investigation? A. You said——

Mr. McGohey: Your Honor, I don't see the relevancy of it to this question at all.

The Court: I don't either. I sustain the objection to it. 1886

Q. How many statements did Major Radovich make, do you know, to any officers of the Government? A. You mean oral or written statements?

Q. We will take them both. First the written ones. A. I believe he made three or four written statements. I believe he did.

Q. Have you copies of them? A. I have copies of three statements, I believe.

Q. Do you know how many statements you have copies of? I don't mean the number of copies, I mean the number of statements. A. I am certain of two and I believe I have a third.

Q. You are not sure of that? A. I am not sure of that.

Q. What two are you certain of? A. The two that were 1887
taken by the Federal Bureau of Investigation.

Q. Those are the only two statements that you are sure you have copies of? A. That is correct. I believe I have a third.

Q. But that is just a belief. You are not certain of it. A. That is right.

Q. Have you present here in the courtroom a copy of the statement taken from Major Radovich in September, 1944? A. Yes, I believe there is one here.

Q. Did you ever read a copy of a statement made by Major Radovich or purporting to be made by Major Radovich to any officer of the Army? A. Yes, I did.

Mr. McGohey: Your Honor, I object to that. I don't see the relevancy of it——

Mr. Keenan: All right. I am trying to save time.

Mr. McGohey: —to the admissibility of the 1945 statement.

Mr. Keenan: I am going to ask these questions some time, perhaps I won't be permitted to have replies to them, but I am going to ask them in the pres-
1889 ence of the jury if we get that far. So it is a question of saving time on this. But if you want me to wait——

The Court: I think it has a bearing on the question or relevancy and I will allow you to answer it.

Mr. Keenan: Would you read the question?

(Question and answer read.)

Q. Did you ever have a copy of that in your file? A. I believe we did.

Q. But you don't know whether it is in your file or not? A. I don't know whether we returned it to the Army or not.

Q. When was the last time you looked at it? A. I don't know. It must be—it may be a year ago since I looked at it.

Q. Well, there may be a lot of things. What is your
1890 best recollection? A. I have no recollection of when I looked at it last.

Q. You didn't look at it in the preparation for trial in this case? A. No, I did not.

Q. Was there something in the statement that you wanted to forget about? A. No.

Mr. McGohey: I object to that.

Mr. Keenan: I have a right to ask that question, in the best faith.

A. (Continuing) No, there was not.

Q. Can you tell us why a second statement was taken by the F.B.I. agent of Radovich?

Mr. McGohey: I object to that, your Honor.

The Court: You are going awfully far, but I will let him answer it.

A. I think Mr. Flynn has answered that question when he stated that there were some additional matters that were not incorporated in the first statement that were incorporated in the second. 1892

Q. Were there some things in the first statement given before Bayer came into the United States Attorney's office in February that were left out of the statement which was taken the 15th of March following, in 1945? A. Not that I recall.

Q. By the way, Mr. Wallace, the statement of Major Radovich that was given or purported to have been given in August of 1944 was attached to the minutes of the court-martial proceeding, was it not? A. If it was I didn't see it, Mr. Keenan.

Q. Have you the copy of the court-martial proceedings in your files? A. Yes, we have a copy.

Q. Have you examined those proceedings with reference to any statement that Major Radovich gave the court-martial? A. No. 1893

Q. You did not consider them material to this lawsuit?

Mr. McGohey: I object to that, your Honor.

The Court: I sustain that objection.

Mr. Keenan: I am testing the credibility of the witness.

Mr. McGohey: I object to that, too. We have had that all morning.

Mr. Keenan: I am merely stating to your Honor why I am asking the question.

The Court: I sustain the objection. Have you any further questions?

Mr. Keenan: No.

Mr. Robb: If your Honor please, I have one question that I overlooked and that I would like to ask.

The Court: Yes, sir, all right.

Direct examination continued by Mr. Robb.

1895 Q. Mr. Wallace, do you recall any conversation with Major Radovich about whether or not he would be allowed to resign for the good of the service? A. I think Major Radovich told me that he had submitted his resignation.

Q. And did he not tell you that he expected to be allowed to resign for the good of the service? A. I think he told me that he expected that his resignation would be accepted.

Q. And that was in these conversations you had with him between your first talk in October or November and the time the case went before the grand jury the first time, isn't that right? A. He mentioned it during that period, I would think, yes.

Mr. Robb: That is all, thank you.

1896 Mr. Keenan: There is one further question.

The Court: All right.

Further cross-examination by Mr. Keenan.

Q. Mr. Wallace, did you not state at the court-martial proceeding that you told Major Radovich in substance that you would make some representations to the court-martial authorities as to any co-operation you received from Major Radovich? A. That I told that to Major Radovich?

Q. Yes. A. I do not think I said that at the court-martial, no.

Mr. Keenan: Just one moment.

Q. Reading from page 199: "Q. You never heard Mr. Flynn tell the accused, Major Radovich, that if he would continue to help you and co-operate with you, you would help the accused with the Army? A. Did I ever hear Mr. Flynn say that?

"Q. Yes. A. I don't recall."

Is that correct; did you say that? A. That is correct.

Q. You do not recall one way or the other? A. Well, now, is this a new question? 1898

Q. Yes. A. I recall making that statement in the court-martial, yes.

Q. "Well, that was the understanding, though, wasn't it, Mr. Wallace? A. I think Major Radovich felt that we were very friendly toward him and that if there was any representation on his behalf that could be made it probably would be made.

"Q. Did you tell him that? A. I don't—as I said, I don't recall whether I told him that, but I would say that he would be justified in assuming that."

Was that your testimony? A. That was my testimony.

Q. Is that correct? A. That is correct.

Q. And why do you say that he would be justified in assuming that? A. Well, I think he realized that I was— 1899
that I felt very badly about the situation that he was in because of his gallantry and bravery in action.

Q. Well, did the way you felt about his gallantry and bravery in action change in accordance with whether or not he co-operated or failed to co-operate with the Government? A. No.

Q. Has it? A. No, I still feel that way.

Mr. Keenan: That is all.
The Court: Is that all?

Redirect examination continued by Mr. McGohey.

Q. Mr. Wallace, at the session of the grand jury in March, 1945, when an indictment was returned naming the two Bayers and Greenblatt as defendants, did Major Radovich testify before that grand jury? A. He did.

Q. Did Samuel Bayer testify before it? A. He did not.

Q. Did Elias Bayer testify before it? A. He did not.

1901

Q. Did Greenblatt testify before it? A. He appeared before it, and, as I recall, refused to answer questions.

Q. But neither of the Bayers appeared before it? A. That is correct.

Mr. McGohey: That is all.
Mr. Robb: May I ask one question?
The Court: Yes.

Recross-examination by Mr. Robb.

Q. Mr. Wallace, Greenblatt, the man who appeared before the grand jury who refused to testify, was indicted, was he not? A. Yes, sir.

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Mr. Robb: That is all, thank you.

Recross-examination by Mr. Keenan.

Q. Those indictments, by the way, were all nolle prossed just before the trial started? A. Yes.

Mr. Keenan: That is all.